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95-1243

No. _____

Supreme Court, U.S.
FILED
FEB 1 1996
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

GERALD FRANK PLUNK
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	Nos. 94-30421 94-30422
Plaintiff-Appellant, Cross-Appellee,	D.C. No. CR-94-036-01-JWS
v.	
GERALD FRANK PLUNK,	MEMORANDUM*
Defendant-Appellee, Cross-Appellant.	

Appeal from the United States District Court
for the District of Alaska
John W. Sedwick, District Judge, Presiding

Argued and Submitted June 5,1995
Submission Deferred June 13, 1995
Resubmitted September 20,1995
Seattle, Washington

Before: BROWNING, WRIGHT, and T.G. NELSON, Circuit Judges

We have jurisdiction over this interlocutory appeal. United States v. Chick, 61 F.3d 682 (9th Cir. 1995).

In United States v. Cretacci, 62 F.3d 307 (9th Cir.1995), we held that if property seized by an agency under the administrative forfeiture procedure, 19 U.S.C. § 1609(a), is

not claimed within a specified time limit, the property is declared "forfeited" and may be sold. The administrative forfeiture of unclaimed property simply constitutes the taking of abandoned property, and as such, does not impose a "punishment" for purposes of the Double Jeopardy Clause. Id. at 310.

In this case, Plunk does not dispute that he received notice of the Government's intent to seek forfeiture of the property seized from his home and his person and that he had to file a claim to preserve any right he had to that property. The required notice was also published in USA Today. Plunk did not file a claim and the property was administratively forfeited. If no claim is filed, the Government has the authority to declare the property forfeited without a judicial adjudication. See 19 U.S.C. § 1609; 21 C.F.R. § 1316.77. This declaration has "the same force and effect as a final decree and order of forfeiture in a judicial forfeiture proceeding in a district court of the United States." 19 U.S.C. § 1609(b). In other words, administrative forfeiture can be used only to obtain the forfeiture of unclaimed property.

Because Plunk did not assert any claim to the seized property, he was not punished when it was forfeited. Further, because Plunk was not a party to the prior administrative forfeiture, he was not in jeopardy and his trial and punishment in the criminal prosecution would not amount to double jeopardy.

Plunk responds that he was forced not to formally contest the civil forfeitures (and thus suffer punishment) to protect his Fifth Amendment privilege in the pending criminal case. He argues that although the notices of seizure did not specify the owner, the actual judgments of forfeiture listed his inmate number and adjudicated him as the owner.

In Cretacci, we rejected "the argument that by requiring a defendant to claim his property we force him to sacrifice his right against self-incrimination in order to preserve his right against Double Jeopardy." Id. at 311. The court pointed out

that "[a] defendant's claim of ownership at a pre-trial suppression hearing of property that he contends was unlawfully seized may not be used to prove the defendant's guilt." Id. Similarly, "a defendant's claim of ownership of property that was subject to forfeiture may not be used for that purpose." Id.

Therefore, Plunk is in no different a position than a criminal defendant who wishes to suppress contraband seized from him. Such a defendant must assert ownership of the property in order to claim that its seizure invaded his rights under the Fourth Amendment. See United States v. Salvucci, 448 U.S. 83 (1980).

Further, there was no "adjudication" of Plunk's ownership of the cash, gold, firearms and watch. The two declarations of forfeiture do contain computer-generated information at the top of the documents stating the seizure number, case number, item(s) seized, value, seizure date and place, judicial district, and note: "OWNER: PLUNK, GERALD F.," "SEIZED FROM: PLUNK, FRANK (INMATE #7603)." However, these notations do not rise to the level of a judicial adjudication of ownership where a claim or a petition for remission or mitigation has not been filed.

In light of the rationale set forth in Cretacci, we hold that the forfeiture of Plunk's abandoned property was not a "punishment," and thus Plunk was not placed in jeopardy. Accordingly, the subsequent criminal prosecution is not barred by the Double Jeopardy Clause. Because we reverse the district court's order dismissing the five of twelve counts on the grounds of double jeopardy, Plunk's cross-appeal of the district court's denial of his motion to dismiss the entire indictment is moot and is therefore dismissed.

REVERSED AND REMANDED IN PART, DISMISSED IN PART.

FILED
NOV 17 1994

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

By:_____/S/_____ Deputy

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	) Case No. A94-036 CR (JWS)
Plaintiff,	)
v.	) ORDER FROM CHAMBERS
GERALD FRANK PLUNK, et al.,	) (Motion to Dismiss - Docket 185)
Defendant.	)

MOTION PENDING

Defendant Gerald Frank Plunk ("Plunk") filed a motion at docket 185 requesting dismissal of all charges in the superseding indictment against Plunk on the grounds that his prosecution would violate the Double Jeopardy Clause of the Fifth Amendment. The motion does not involve Plunk's co-defendant, Timothy Pierson ("Pierson"). Magistrate Judge John Roberts, to whom the motion was referred for a report and recommendation pursuant to Local Magistrate Rule 4, has

recommended that the motion be granted. This court reviews de novo.[1]

PROCEDURAL POSTURE

Plunk and Pierson were to have been tried on October 31, 1994. Plunk filed his double jeopardy motion on October 26, 1994.[2] No matter how this court may decide the double jeopardy motion, trial as to Plunk should not proceed until after the completion of an expedited review in the Court of Appeals. See Abney v. United States, 431 U.S. 651, 662 N.8 (1977). Trial in this case is expected to take several weeks and will involve many witnesses who must be transported to Alaska from as far away as the East Coast. The interest in trying Plunk and Pierson in a single trial is especially strong.

Following a conference with counsel and a hearing on the record, the trial date for both defendants was continued until January 3,1995. Application of the Speedy Trial Act makes it virtually impossible to delay Pierson's trial beyond that date. This court set a briefing schedule allowing for the

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[1]Ordinarily, in this District, following an initial report and recommendation from a magistrate judge, the parties have an opportunity to file objections and responses to objections which are considered by the magistrate judge before he or she issues a final report and recommendation. Here the requirement for expedited pre-trial review in the Court of Appeals, United States v. Abney, 431 U.S. 651, 662 n.8 (1977), and the time constraints of the Speedy Trial Act, 18 U.S.C. § 3161 et seq., have required this court to consider the objections and responses as part of its de novo review without a final report and recommendation from the magistrate judge.

[2]Plunk's counsel cannot be seriously faulted for filing the motion late, because it is based upon an evolving area of the law which is only now coming to the attention of counsel. Indeed, were the potential double jeopardy ramifications of civil forfeitures apparent earlier, it is highly unlikely the government would have risked its prosecution of Plunk on charges which could produce a term of incarceration exceeding 30 years and a fine of up to $4,000,000 in order to secure administrative forfeitures of chattels whose combined estimated worth is less than $16,170.

entry of this order no later than November 17, 1994, which should afford enough time for expedited appellate review. See United States v. Miranda-Parra, 637 F.2d 610 (9th Cir. 1980) (expedited double jeopardy appeal decided in 32 days). It is hoped that the appeal will be decided in time to allow a single trial to proceed on January 3, 1995.

BACKGROUND

On March 22, 1994, a one-count indictment charging Plunk with conspiracy to distribute cocaine in Alaska from the "Fall of 1987 until no later than April, 1991" in violation of 21 U.S.C. §§ 841(a)(1) and 846 (the "Alaska I conspiracy") was returned. Plunk was arrested on March 25, 1994. On April 26, 1994 a superseding indictment was filed.

The superseding indictment contains 12 counts: Count 1 charges Plunk and Pierson with conspiracy to transport cocaine shipped from Columbia [sic] across the "Lower 48" states of the Union from April 1, 1993, until December 31, 1993 in violation of 21 U.S.C. §§ 841(a)(1) and 846 (the "Lower 48" conspiracy). Count 2 charges Plunk with engaging in a continuing criminal enterprise from about April 1993 through December 1993 in violation of 21 U.S.C. § 848. Counts 3 through 6 charge Plunk with using a communications facility to facilitate drug trafficking in violation of 21 U.S.C. § 843(b). Counts 7 and 8 charge Pierson with violating 21 U.S.C. § 843(b). Counts 9 through 11 charge Plunk with possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1). Count 12 charges Plunk with conspiracy to distribute cocaine in Alaska from the Fall of 1980 until December 31 1993 (the "Alaska II" conspiracy).

In the meantime, agents of the Drug Enforcement Administration ("DEA") seized certain items or personal property pursuant to 21 U.S.C. § 881, which were later declared forfeit to the United States pursuant to 19 U.S.C. § 1609 as follows: On March 25, 1994, a Rolex wristwatch valued at $1,500 was the subject of Seizure # 152090 and declared forfeit on June 3, 1994. On March 24, 1994,

assorted firearms valued at $4,040 were the subject of Seizure # 152183 and declared forfeit on June 10, 1994. On March 24, 1994, currency in the amount of $9,660 was the subject of Seizure # 152199 and declared forfeit on June 24, 1994. On March 24, 1994, three small bags of placer gold valued at $967.89 were the subject of Seizure # 152824 and declared forfeit on August 24, 1994.

The declarations of forfeiture all identify Plunk as the property's owner at the time of seizure.[3] Further, as the notices of seizure state, all the property was seized "because it was used or acquired as a result of a drug-related offense." All of the property, save the Rolex, was found at Plunk's residence on March 24, 1994, when officers executed a search warrant. The Rolex was taken from Plunk when he was arrested on March 25, 1994. According to the Declaration of William J. Snider, Forfeiture Counsel of DEA, each of the above four seizures was accepted for administrative forfeiture based upon an evaluation process described in his declaration.

An additional forfeiture proceeding involving Plunk's property is pending. On September 8, 1994, the government filed its complaint in United States v. Four Aircraft, Case No. A94-401 CIV (JKS). The case is before Judge Singleton of this District. There, the Government seeks forfeiture of four aircraft registered to Plunk on the grounds that they are "property or proceeds traceable to an exchange for controlled substances in violation of 21 U.S.C. § 801 et seq."[4] According to the Government, "The facts and circumstances supporting the seizure and forfeiture of the defendant aircraft and parts are contained in (the attached) Affidavit of Special

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[3]Plunk did not contest the forfeitures. His briefing indicates that the decision not to file a claim to the property was made in order to preserve his Fifth Amendment right not to testify.

[4] Verified Complaint For Forfeiture at ¶ 1, Case No. A94-401 CIV (JKS).

Agent Robert E. Cayford of [DEA].[5] On September 23, 1994, Plunk filed a claim in the action asserting ownership of the four planes.

On October 27, 1994, the Government moved to stay, or alternatively, to dismiss Four Aircraft pending disposition of its request for en banc reconsideration of the decision by the Court of Appeals for the Ninth Circuit in United States v. $405,089.23, 33 F.3d 1210 (9th Cir. 1994). The general averment that the forfeiture of the four aircraft is based upon the violation of 21 U.S.C. § 801 et seq., coupled with the information in the September 8, 1994, affidavit of DEA Special Agent Robert Cayford which is incorporated into the complaint by reference, indicates that the forfeiture of the aircraft is sought on the basis of Plunk's participation in the Alaska conspiracies and the Lower 48 conspiracy as well as upon possession of cocaine with intent to distribute. In the motion for stay, the Government represented that the charges in the instant criminal prosecution are the same violations underpinning the civil forfeiture sought in Four Aircraft.

On November 16, 1994, Judge Singleton issued an order which stayed further proceedings in Four Aircraft pending the outcome of all criminal prosecutions of Plunk. Obviously, Judge Singleton found this course of action more appropriate than either staying the matter pending disposition of the en banc request in $405,089.23, 33 F.3d at 1210, or dismissing the civil forfeiture action without prejudice as requested by the Government.

Given the stay in Four Aircraft, this court concludes that Plunk has not yet been punished in the judicial forfeiture and that he is not presently subject to the burden of defending multiple proceedings asserting commission of the same offenses. For these reasons the continued prosecution of Plunk on the charges in the superseding indictment is not foreclosed on double jeopardy grounds by the judicial

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[5] Id. at ¶ 9. The facts and circumstances recounted by Mr. Cayford include alleged transactions which form part of each of the two alleged conspiracies.

forfeiture action in Four Aircraft. See North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

DISCUSSION

The magistrate judge recommended that Plunk's double jeopardy motion be granted at docket 208. Based upon this court's de novo review, with the exception of the implied finding of fact and related conclusion of law that the administrative forfeitures are based upon all the same offenses as those with which Plunk is charged in the superseding indictment, the findings and conclusions made by the magistrate judge are correct and are adopted. The implied factual finding and related conclusion that the administrative forfeitures are based upon the same offenses requires discussion.

To bar subsequent prosecution, of course, a forfeiture must be based on the same offense charged in the indictment. $405,089.23, 33 F.3d at 1216. The Supreme Court recently explained that the only proper way to test for the "sameness" of two crimes is to compare the individual elements of each. If there is not at least one different element, then the crimes are the same offense for double jeopardy purposes. United States v. Dixon, __ U.S. __, 113 S.Ct. 2849, 2856 (1993). In overruling Grady v. Corbin, 495 U.S. 508 (1990), the Dixon Court held that, even if proof of one of the elements of the second crime will involve proof of the same conduct underpinning an element of the first crime, there is no double jeopardy problem so long as at least one element is not common to both.

The Government argues that application for the same element test to the completed administrative forfeitures and the crimes charged in the superseding indictment discloses that prosecution of Plunk as charged, will not expose him to double jeopardy. With regard to the conspiracy counts in the superseding indictment, this court understands the Government's argument to be as follows. According to the Snider declaration, the administrative forfeitures were all based upon alleged violations of 21 U.S.C. § 841(a)(1)

which criminalizes the possession of cocaine with intent to distribute. Violation of 21 U.S.C. § 841(a)(1) is a crime whose elements do not include the element of agreement, which is required for any conspiracy so the crimes charged in counts 1 and 12 differ from the conduct upon which the forfeitures were based according to Snider's explanation.

At most, the Government would acknowledge some merit to the proposition that the administrative forfeitures did implicate the Alaska I and Alaska II conspiracies.[6] This concession would be consistent with the fact that the Snider declaration also indicates that the forfeitures proceeded based upon Plunk's arrest. Plunk was arrested because he was charged in the original indictment with participation in the Alaska I conspiracy.

So long as the administrative forfeitures are not seen to involve more than distribution of cocaine in Alaska and the Alaska I conspiracy, the Government is correct, because a comparison of the Alaska I conspiracy described in the original indictment and the "Lower 48" conspiracy charged in count 1 and the Alaska II conspiracy charged in count 12 shows that the elements to be proved are different. To prove the Alaska I conspiracy, the Government would have to prove agreement to distribute cocaine in Alaska from the Fall of 1987 until no later than April of 1991. In contrast, to prove guilt on Count 1, the Government would have to prove that Plunk agreed with someone else to distribute cocaine across the "Lower 48" from about April of 1993 until December of 1993. To prove the Alaska II conspiracy charged in count 12, the Government would have to prove that Plunk agreed with someone to distribute cocaine in Alaska from the Fall of 1980 until December of 1993. The three conspiracies charged depend on proof of demonstrably different agreements and are, therefore, different crimes.

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[6] The government makes little of the differences between these two conspiracies, which the government calls simply the "historical" conspiracy. The government term for the Lower 48 conspiracy is the "Columbian" [sic] conspiracy.

Count 2 charging continuing criminal enterprise involves several elements not included in either the violation of 21 U.S.C. § 841(a)(1), cited directly by Snider, or the Alaska I conspiracy indirectly involved by Snider, as the bases for the administrative forfeitures. See 21 U.S.C. § 848. Counts 3 through 6 charge that Plunk used communication devices to facilitate drug trafficking. Again it is apparent that the elements of the crime are different from either possession with intent to distribute or conspiracy to distribute cocaine. See 21 U.S.C. § 843(b).

Counts 9,10, and 11 charge Plunk with possession with intent to distribute cocaine, the very crime upon which Snider says the administrative forfeitures proceeded, but the distribution charged involves transactions associated with the Lower 48 conspiracy, not the Alaska I conspiracy charged in the original indictment extant at the time of the seizures. Thus, it would appear that these three counts need not be dismissed if one accepts the Government's analysis of the forfeiture proceedings.

The difficulty with the Government's analysis is that it depends upon accepting at somewhat less than full face value an explanation of the bases for the four administrative forfeiture proceedings offered by DEA counsel Snider which is not entirely consistent with all of the available information, including information referenced by Mr. Snider. According to the Snider declaration, the decision to accept each of the four cases for administrative forfeiture was made at the end of an evaluation process which "included a legal review of the probable cause that existed to seize [the item seized]." Snider declaration at ¶¶ 4(a), 5(a), 6(a), and 7(a).

Evidence of what probable cause was used to support the three property seizures at Plunk's residence[7] is found in the March 22, 1994, affidavit of DEA special agent Cayford used to obtain the search warrant for the residence. Cayford's affidavit is not limited to asserting probable cause to believe

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[7] These were the seizures of the $9,660 in U.S. currency, the firearms, and the placer gold.

Plunk is guilty only of simple possession with intent to distribute or participation in the Alaska I conspiracy. The Cayford affidavit recites probable cause to believe facts that would support Plunk's participation in the Alaska I conspiracy, the Alaska II conspiracy, and the Lower 48 conspiracy.

The information Cayford attributes to Warren Jeff Funderburk at ¶ 1 of the Background section of his affidavit indicates that on 10 to 15 occasions between Fall of 1988 and Spring of 1990, Plunk sold kilogram quantities of cocaine to Funderburk, who then resold the drug. This information appears relevant to either the Alaska I or Alaska II conspiracies, as well as to possession with intent to distribute in Alaska. At ¶ 2 of the affidavit, Cayford attributed information to an anonymous source who described himself as a facilitator in the Plunk transfers to Funderburk.[8] The information Cayford attributes to Hal Booher at ¶¶ 3 and 4 concerning repeated interstate deliveries of 200 to 220 kilogram loads of cocaine is information associated with the Lower 48 conspiracy, as well as with possession with intent to distribute somewhere outside Alaska. The assertions in ¶ 4(D) that Booher met Plunk in November 1983 and that Booher learned Plunk distributed cocaine in Alaska appear to establish a pattern of distribution more likely consistent with the Alaska II conspiracy than the Alaska I conspiracy.[9] The

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[8] The size of Plunk's sales to Funderburk, the participation of a third party as a "facilitator," and the resale by Funderburk all imply that Plunk had some sort of agreement regarding the distribution and, hence, was participating in a conspiracy.

[9] It may first be observed that in isolation this paragraph is equally consistent with simple possession and distribution. The absence of quantity information, such as the kilogram sales to Funderburk, and the absence of any information that the sales involved a "facilitator" makes this information consistent with simple distribution not involving an agreement with others. However, in the overall context of the affidavit, it seems as likely to evidence the outcome of joint effort as sales by Plunk acting alone. As to the question of whether the information relates to the Alaska I or Alaska II conspiracies, the way the paragraph is written leaves unclear when Booher learned of Plunk's participation in cocaine distribution in Alaska. It is clear Booher met Plunk in November of

information in ¶ 5 clearly relates to distribution in Alaska and, combined with the other information, may also relate to either the Alaska I or Alaska II conspiracies.

The fourth seizure made at the time of Plunk's arrest necessarily proceeded on the basis that Plunk was properly arrested. Thus, seizure of the Rolex appears to have been based upon probable cause to believe that Plunk had committed the crime charged in the original indictment--participation in the Alaska I conspiracy.

This court finds that the crimes the Government had reason to believe Plunk had committed at the time of the seizures and upon which the administrative forfeitures proceeded were that Plunk possessed cocaine with intent to distribute it in Alaska, that Plunk possessed cocaine with intent to distribute it somewhere outside Alaska, and that Plunk was a member of the Alaska I, Alaska II and Lower 48 conspiracies. When this finding is coupled with the other findings and conclusions reached by the magistrate judge and adopted by this court, it follows that counts 1, 9, 10, 11 and 12 must be dismissed, because Plunk cannot be put in jeopardy on charges for which he has already been punished. The remaining counts being constituted neither of the same criminal acts upon which the administrative forfeitures proceeded, nor criminal acts comprised of the same elements under the Dixon test, should not be dismissed. Prosecution of Plunk on counts 2 (continuing criminal enterprise), and counts 3 through 6 (communications facility used in drug trafficking) may proceed without violating the Double Jeopardy Clause.

Plunk invites this court to hold that count 2 through 6 must be dismissed. He makes several points. First, each Notice of Seizure recites that the subject property "was seized by Special Agents of the [DEA] for forfeiture under [21 U.S.C. § 881] because it was used or acquired as a result of a

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1983. Thus, it is a more natural reading of the paragraph to conclude that Plunk was involved in distributing cocaine in Alaska prior to the inception of the Alaska I conspiracy in Fall of 1987.

drug-related offense. (See [21 C.F.F. § 1316.91(d)] for the definition of the term 'drug-related offense.')" (Boldface in original.) The regulation cited in the notices to define the crime supporting the forfeitures provides:

> The term Drug-Related Offense means any proscribed offense which involves the possession, distribution, manufacture, cultivation, sale, transfer, or the attempt or conspiracy to possess, distribute, manufacture, cultivate, sell or transfer any substance the possession of which is prohibited by Title 21 U.S.C.

21 C.F.R. § 1316.91(d).

Plunk also points out that only two of the administrative forfeitures were the subject of notice of forfeiture letters sent prior to the return of the superseding indictment on April 26, 1994. The letter concerning the Rolex was sent to Plunk and to the publisher on April 18, 1994. The letter concerning the firearms was sent on April 25, 1994. The other two letters concerning the $9,660 and the placer gold were not sent until May 9, 1994. However, there is nothing in the letters which purports to retroactively alter the basis for the seizures, all four of which antedate the superseding indictment.

Plunk also notes that in each of the four proceedings, the Declaration of Forfeiture fails to recite the specific crime upon which the forfeiture was predicated. Each merely indicates that the property was seized pursuant to 21 U.S.C. § 881, that notice was given pursuant to 19 U.S.C. § 1607, and that the property is declared forfeit pursuant to 19 U.S.C. § 1609.

Plunk is correct to the extent that the statutory and regulatory underpinnings of the seizures are consistent with forfeitures based upon all of the crimes charged in the superseding indictment; these authorities are written broadly to embrace any violation of 21 U.S.C. § 801 et seq. However, Plunk is incorrect to the extent that he maintains the facts show the administrative forfeitures were based upon the

continuing criminal enterprise and use of communication facility crimes. The probable cause supporting the seizures did not include information supporting the continuing criminal enterprise and communication facility crimes.

Plunk advances additional arguments, including arguments based on the concepts of waiver and estoppel. This court has considered all of Plunk's other arguments and finds them to be without merit.

CONCLUSION

For the reasons set forth above and for the reasons provided in the report and recommendation at docket 208, the motion at docket 185 is **GRANTED IN PART** and **DENIED IN PART** as follows: Counts 1, 9, 10, 11, and 12 are dismissed. Counts 2 through 6 inclusive remain set for trial on January 3, 1995.

Any party not satisfied with this court's decision shall immediately take an expedited appeal as contemplated by United State [sic] v. Abney, 431 U.S. 652, 662 n.8 (1977). The Clerk is directed to expedite preparation of whatever record on appeal the parties may designate. The parties are authorized to designate documents filed in Case No. A94-401 Civ (JDS) for inclusion in the record on appeal in this action. The Clerk shall call counsel immediately upon filing of this order and counsel shall promptly obtain copies.

DATED this 17th day of November, 1994 at Anchorage, Alaska.

/S/

JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE

FILED
NOV 4 1994

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

By:_____/S/_____ Deputy

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	) Case No. A94-036 CR (JWS)
Plaintiff,	)
v.	) RECOMMENDATION REGARDING MOTION TO
GERALD FRANK	) DISMISS ON GROUNDS OF DOUBLE JEOPARDY
Defendant.	) (Document No. 185)

Defendant **GERALD FRANK PLUNK** moves for an order barring his prosecution in the instant case on grounds of double jeopardy. Plunk contends that his further prosecution violates the Fifth Amendment's Double Jeopardy Clause because he has already been placed in jeopardy in administrative and civil forfeiture proceedings. Docket No. 185. The government opposes the motion at Docket No. 189.[1] For reasons stated below, I recommend that the Motion to Dismiss be GRANTED.

[1] The following additional pleadings were filed:

Docket No. 193, Defendant's Supplemental Exhibits in Support of Motion for Order Barring Further Prosecution on Grounds of Double Jeopardy; *Docket No. 196*, Government's Response to Defendant's Motion for Continuance Pending Interlocutory Appeal on Grounds of

BACKGROUND

Gerald Plunk was indicted on March 23, 1994, for conspiracy to distribute cocaine in violation of 21 U.S.C. § 846. Mr. Plunk was arrested March 25, 1994, and detained in custody pursuant to a pretrial detention order. At the detention hearing the government presented evidence and argued that certain items (hand guns, currency in a heat-sealed package, placer gold, passport) hidden in Plunk's residence were incriminating. Agents of the Drug Enforcement Administration (DEA) executed search warrants as follows: A94-049 MJ issued March 22, 1994 for A-Frame single residence, 14940 Long Bow Drive, Anchorage; A94-051 MJ issued April 5, 1994 for Big Mountain Lodge, Iguigig, Alaska; A94-056 MJ issued April 5, 1994 for Safe Deposit Box #190 FNBA-Main Branch, Anchorage; A94-095 MJ issued April 26, 1994 for Fly-in Cabin, Hock Lake; and A94-096 MJ issued April 26, 1994 for Floor Safe, 2101 W. 29th Ave # 27, Anchorage. Subsequently, the government seized four (4) airplanes at the lodge and certain real property. Publication of Notice of Seizures were made in late May and early June, 1994.

The government issued Notices of Seizure for property seized March 24, 1994 from Gerald Plunk as follows:

Nine (9) assorted weapons valued at $4,040;

Double Jeopardy; *Docket No. 197*, Government's Supplementary Response to Defendant's Motion to Dismiss; *Docket No. 198*, Supplemental Briefing Regarding Divestiture of Jurisdiction Pending Appeal on Double Jeopardy Issue; *Docket No. 202*, Defendant's Reply to Government's Opposition and Government's Supplemental Opposition to Motion to Dismiss on Grounds of Double Jeopardy; *Docket No. 203*, Defendant's Request for Evidentiary Hearing. Defendant's Supplemental Reply to Government's Opposition and Government's Supplemental Opposition to Motion for Order Barring Further Prosecution of Grounds of Double Jeopardy was filed in Open Court on November 3, 1994.

$9,660 in currency; and

Placer gold valued at $967.89.

First publication of this property occurred in May 1994. See Exhibits A, B and C to Defendant's Motion for Order Barring Further Prosecution, Docket No. 185. A separate Notice of Seizure was published April 27, 1994, for a

> *Rolex wristwatch valued at $1,500*, seized from Gerald Plunk on or about March 25, 1994.

See Exhibit D, Docket No. 185.

A Declaration of Forfeiture was issued by the Senior Attorney, Office of Chief Counsel, Asset Forfeiture Section of the Department of Justice for the Rolex wristwatch on June 3, 1994 and for the $9,660 in currency on June 24, 1994. See Exhibit B to Government's Supplementary Response, Docket No. 197. The nine (9) firearms and the placer gold were also forfeited administratively on June 10, 1994 and August 19,1994, respectively. See Exhibits E and F attached to Plunk's Notice of Additional Exhibits, Docket No. 205. These declarations indicate that no claims were filed for said property.

A superseding indictment filed April 26, 1994, added a co-defendant Timothy Pierson. It alleges charges against Plunk of continuing a criminal enterprise (21 U.S.C. § 848), illegal use of a communication facility (21 U.S.C. § 843(b)), possession of cocaine with intent to distribute (21 U.S.C. § 841(a)(1) and a second conspiracy to distribute cocaine (21 U.S.C. § 846). Count two of the superseding indictment seeks to forfeit a (different) bag of currency and various described pieces of real estate allegedly constituting or derived from drug trafficking proceeds during the continuing criminal enterprise pursuant to 21 U.S.C. § 853 and 848.

On September 8, 1994, the United States filed a verified complaint to enforce the provisions of 21 U.S.C. § 881(a)(6) for forfeiture of four (4) aircraft traceable to an

exchange for controlled substances in violation of 21 U.S.C. § 801 et seq. See United States v. Four Aircraft, etc., Case No. A94-401 Civil (D.Alaska). The complaint alleged Gerald Plunk as the registered owner of the aircraft. The in rem complaint relied upon the same investigation as led to Plunk's indictment. Plunk filed a Notice of Claim on September 23, 1994. On October 27, 1994, the government moved for a stay of proceedings pending the outcome of Plunk's criminal prosecution.

DISCUSSION

Plunk contends that jeopardy attached when the government adjudicated administrative forfeitures of property seized by the government as a result of the underlying alleged criminal conduct. He contends that he was forced to suffer the forfeiture of his personal property in order to maintain his constitutional right to remain silent and avoid self-incrimination. He objects to further proceedings of the criminal trial including empaneling of the jury. Plunk argues that he has already been punished as a result of seizures and administrative forfeiture of his personal property. He seeks an order dismissing the indictment as to him with prejudice.

The government responds that the seizure of the property does not constitute "punishment" or consecutive proceedings as defined by case law. Government's Response, Docket No. 189, p.2. The government argues that administrative forfeitures are distinct from civil forfeitures with respect to the Double Jeopardy Clause of the Fifth Amendment. It claims that Plunk has not been "punished" by the administrative forfeiture of property to which he made no claim. The issue posed is whether the Double Jeopardy Clause of the United States Constitution is implicated. This determination is grounded in the facts of the particular case, as well as the nature of the law under which the sanctions were imposed.

In drafting the initial version of what came to be the Double Jeopardy Clause, James Madison focused explicitly on the issue of multiple punishment. He stated "No person

shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense." United States v. Halper, 490 U.S. 435, 440 citing 1 Annals of Cong. 434 (1789-91) (Gales Ed. 1934).[2] The Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. In Re Kurth Ranch, 986 F.2d 1308, 1310 (9th Cir. 1993), affirmed 114 S.Ct. 1937 (1994); United States v. Halper, 490 U.S. 435, 440 (1989). Plunk's motion implicates the third of these protections.

The multiple-punishment prohibition applies when the government attempts to criminally punish a defendant twice for the same offense. United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984). The clause does not bar the government from imposing both a civil and a criminal penalty upon a defendant for the same offense. Helvering v. Mitchell, 303 U.S. 391 (1938). However, where the government seeks to impose not only a criminal sanction, but also a civil sanction in a separate proceeding that can be understood as punitive, the Double Jeopardy Clause is violated. See United States v. Halper, 490 435, 448 (1989); United States v. $405,089.23 U.S. Currency, 33 F.3d 1210 (9th Cir. 1994).[3]

To determine whether criminal prosecution violates the Fifth Amendment in light of the forfeiture proceedings, the court must consider two questions: Whether the criminal prosecution and the civil forfeiture actions constitute separate

---

[2] Halper involved a medical doctor who had been convicted and punished under the Criminal False Claim statute, 18 U.S.C. § 287 for filing false MediCare claims. The court considered whether he could be fined for the same false claims under the civil provisions of the False Claims Act, 31 U.S.C. §§ 3729-3731. The court held that the Double Jeopardy Clause prevented it, to the extent that the fine exceeded what was needed to cover "legitimate non-punitive governmental objectives." 490 U.S. at 448.

[3] A Motion for Rehearing En Banc filed on or about October 20, 1994 is pending.

"proceedings," and whether civil forfeiture under 21 U.S.C. § 881(a)(6) constitutes "punishment." United States v. $405,089.23 U.S. Currency, 32 F.3d 1210, 1216 (9th Cir. 1984).

A. Separate Proceedings

The government's efforts in characterizing the proceedings as one coordinated prosecution fails under contemporary Ninth Circuit law. The government's characterization of a forfeiture as "administrative" does not preclude this conclusion. In the Ninth Circuit, parallel proceedings are separate proceedings, not the "same proceedings." $405,089.23 U.S. Currency, at 1216. In that case the Ninth Circuit relying on Jeffers v. United States, 432 U.S. 137 (1977) rejected the contrary view of the Second and Eleventh Circuits. "[A] civil forfeiture action which is brought and tried separately from a criminal prosecution and is based upon the same offense constitutes a separate 'proceeding'." $405,089.23 U.S. Currency, at 1218. In the instant case the forfeiture actions were before different fact-finders and different judges. Recently, a sister court concluded that the government's characterization of a forfeiture as "administrative" does not preclude this conclusion. Quinones-Riuz v. United States, 1994 WL 531313 (S.D.CA.)

B. Administrative Forfeitures As Punishment

Next, the court must determine whether any of the administrative forfeitures actions constitute "punishment." Administrative forfeitures have been declared as to the Rolex Watch, $9,660 in currency, gold nuggets and nine (9) firearms. No claims were filed in response to the Notice of Seizures for these properties. The government argues that the civil penalties imposed in these related administrative forfeiture actions, do not constitution [sic] "punishment" for the purpose of the Double Jeopardy Clause because judgment in the forfeiture proceedings was obtained by default and thus there is no showing that Plunk has been deprived of any of his property.

The government cannot seriously argue that the administrative forfeitures in this case do not refer to property associated with the criminal defendant. The search warrants authorized searches of Plunk's property; the seizure notices reference Plunk, and the underlying investigation; and the indictment ties the property to Plunk. The record shows that Plunk was arrested for conduct giving rise to the administrative seizures and forfeitures as well as the indictment. The government's evidence at the bail hearing linked some of the personal property forfeited to Plunk. The government wants the court to find that Plunk has not been "punished" through civil forfeitures because he was not a party to those proceedings. At the same time the government would deny him standing to assert a claim unless he waived his Fifth Amendment rights to assert standing. The government cannot have it both ways.

Plunk relies on the government's use of seized evidence at the bail hearing to illustrate that some of the property referenced in the administrative forfeiture actions is the same property and relates to the same offenses for which he is being prosecuted. At the bail hearing the government argued that Plunk was using the firearms and money to facilitate the underlying conspiracy to traffic in controlled substances. Plunk refers to the bail hearing to show the interplay of his right against self-incrimination in the civil forfeiture proceedings and in the criminal prosecution.

The government analogizes this situation to one where a defendant "successfully avoids adjudication of his guilt." "Jeopardy" does not focus upon the resulting adjudication, but rather upon the defendant's position of having to defend. The mere filing of an indictment does not create jeopardy; the government may dismiss the charge without prejudice to re-instituting further prosecution for the same charge.

The Supreme Court has recognized a common understanding that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties. 490 U.S.

at 447. Under Halper it is the purpose actually served by the sanction imposed on the individual not the underlying nature of the proceeding giving rise to the sanction that must be evaluated in determining whether a particular civil sanction constitutes criminal punishment. Id, n.7. The labels "criminal" and "civil" are not significant in determining whether a sanction constitutes punishment for double jeopardy purposes. $405,089.23 U.S. Currency, at 1218; Quinones-Ruiz v. United States, 1994 WL 531313 (S.D.CA.) (Forfeiture of convicted plaintiff's currency constituted a second punishment in violation of plaintiff's right under the Fifth Amendment to be free from double jeopardy). A legislature's description of a statute as civil does not foreclose the possibility that it has a punitive character for double jeopardy purposes. Department of Revenue of Montana v. Kurth Ranch, 114 S.Ct. 1937 (1994); Halper, supra. Under Halper, a sanction which is designed even in part to deter or punish will constitute punishment, regardless of whether it also has a remedial purpose. Austin v. United States, 113 S.Ct. 2801, 2806 (1993); $405,089.23 U.S. Currency, at 1219. "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retribution or deterrent purposes, is punishment. . . ." Halper, 490 U.S. at 448.

The Supreme Court recognizes that statutory in rem forfeiture may impose punishment. Legislative history of 21 U.S.C. § 881 recognizes that "the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs." Senate Report No. 98-225, p. 191 (1983). The constitutional protection against double jeopardy is intrinsically personal. Halper.

The Ninth Circuit affirmed the district court's denial of a motion to dismiss the indictment on the grounds of double jeopardy holding that forfeiture of property used to grow marijuana was not a double jeopardy bar to the prosecution. See United States v. McCaslin, 959 F.2d 786 (9th Cir. 1992), cert. denied 113 S.Ct. 382 (1992). The Ninth Circuit held that Halper had no application to the ancient practice by which

instrumentalities of a crime may be declared forfeit to the government. 959 F.2d at 788. Subsequently, the Ninth Circuit recognized in United States v. $405,089.23 U.S. Currency, that the Supreme Court in Austin rejected the McCaslin analysis. The Supreme Court stated:

> "In light of the historical understanding of forfeitures as punishment, the clear focus of §§ 881(a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood these provisions as serving to deter and to punish, we cannot conclude that forfeiture under §§ 881(a)(4) and (a)(7) serves solely a remedial purpose."

Austin, 113 S.Ct. at 2812, citing Halper, 490 U.S. at 448. See $405,089.23 U.S. Currency, 33 F.3d at 1219. Most recently, Judge Dwyer granted McCaslin's motion to vacate conviction and sentence under 28 U.S.C. § 2255 for the reason that the criminal sentence, imposed in a separate proceeding more than a year after judgment was entered forfeiting his residential real property under 21 U.S.C. § 881(a)(7), constituted a second punishment for the same offense in violation of the Double Jeopardy Clause. See United States v. Duane B. McCaslin, 1994 WL 494764 (W.D.WA. 1993).

Even though the forfeiture proceedings in the instant case were commenced before the Ninth Circuit rendered its opinion in $405,089.23 U.S. Currency, the Halper -- Austin analysis, provided the test to determine whether a civil forfeiture under 21 U.S.C. § 881 constituted "punishment." In Austin the Supreme Court employed the Halper test which it used to decide whether a civil monetary penalty constituted "punishment" for purposes of the Double Jeopardy Clause in determining whether the excessive fines clause applied. The Ninth Circuit in $405,089.23 U.S. Currency merely restates what the Supreme Court's decision in Austin made clear that Halper's double jeopardy protections apply to most civil forfeiture cases. The government was not free to ignore Austin but rather should have looked to the entire applicable statute to determine whether a forfeiture constitutes

"punishment" rather than dwelling on the nature of the property sought to be forfeited. Austin rejected a case-by-case approach to determine whether forfeiture constitutes "punishment." 113 S.Ct. at 2812, n.14.

The Austin court focused on 21 U.S.C. §§ 881(a)(4) and (a)(7). The court identified the punitive purpose of the sections on the culpability of the owner. Significant to the court was the fact that the statute expressly provided an innocent owner defense. It authorizes forfeiture only where the owner is himself involved in illegal activity. See Austin, 113 S.Ct. at 2810. The court noted that Congress has chosen to link forfeiture directly to the commission of drug offenses. Austin acknowledges the historical understanding of forfeiture as punishment. 113 S.Ct. at 2812.

Any doubt that the Austin analysis of what constitutes punishment applies as well under the Double Jeopardy Clause was made clear by the Supreme Court in Department of Revenue v. Kurth Ranch, 114 S.Ct. 1937 (1994). "A defendant convicted and punished for an offense may not have a non-remedial civil penalty imposed against him for the same offense in a separate proceeding." Id. at 1945.

The principles set forth in Austin lead to the conclusion in the instant case that the statutes relied upon by the government operate to punish and deter notwithstanding any remedial purpose that may be served. The government forfeited the U.S. Currency, placer gold and watch under 21 U.S.C. § 881(a)(6). This section provides:

> "(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate

> any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."

The firearms were forfeited under 21 U.S.C. § 881(a)(11) which provides in pertinent part:

> "Any firearm (as defined in § 921 of Title 18) used or intended to be used to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2) and any proceeds traceable to such property."

Authority for administrative forfeiture of the items pursuant to 21 U.S.C. § 881 is found at 19 U.S.C. § 1609. These forfeitures have the same force and effect as a contested civil judicial forfeiture. 19 U.S.C. § 1609(b). A contested trial is not necessary. See Kurth Ranch, 114 S.Ct. at 1492.

It is clear that jeopardy is complete when a judgment is entered. Id. at 1942. No judgment has been tendered in Case No. A94-401 Civil seeking the forfeiture of the four airplanes. Because the administrative forfeitures "resulted in punishment" it is unnecessary for the court to determine whether jeopardy has attached in Case No. A94-401 Civil, the civil forfeiture action against the airplanes.[4] It is likewise unnecessary to address Plunk's contention that the government purposely instituted the forfeiture proceedings to gain advantage by "splitting" the prosecution of Plunk into the civil punishment proceedings and criminal punishment proceedings.

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[4] Plunk contends that the mere filing of a forfeiture claim impacts his Fifth Amendment privileges and thereby constitutes jeopardy.

CONCLUSION

The administrative forfeitures of Plunk's Rolex watch, currency, placer gold and nine (9) firearms constitute "punishment" in a separate proceeding for double jeopardy purposes. Under Ninth Circuit law this court must conclude that the legislative history of the relevant statutes allowing the forfeitures show a Congressional intent to punish and deter, and they do not serve solely a remedial purpose.

The development of law in this area has arguably led to unintended results in the administration of justice. This court is bound to follow the Ninth Circuit law. It is up to the Supreme Court and Congress to provide clear direction in this quagmire. Accordingly, it is recommended that Defendant Plunk's Motion to Dismiss the Indictment on Grounds of Double Jeopardy be Granted.

DATED this 4th day of November, 1994, at Anchorage, Alaska.

/S/

JOHN D. ROBERTS
United States Magistrate Judge

Pursuant to Local Magistrate Rule 12(C), a party seeking to object to this proposed finding and recommendation shall file written objections with the Clerk of Court no later than the close of business on **NOVEMBER 9, 1994**. The failure to object to a magistrate judge's findings of fact may be treated as a procedural default and waiver of the right to contest those findings on appeal. McCall v. Andrus, 628 F.2d 1185, 1187-1189 (9th Cir.), cert. denied, 450 U.S. 996 (1981). Objections and responses shall not exceed five (5) pages in length, and shall not merely reargue positions presented in motion papers. Rather,

objections and responses shall specifically designate the findings or recommendations objected to, the basis of the objection, and the points and authorities in support. Response(s) to the objections shall be filed on or before **NOVEMBER 14, 1994**. The parties shall otherwise comply with provisions of Local Rule 12 (C).

Reports and recommendations are not appealable orders. Any notice of appeal pursuant to Fed.R.App.P. 4(a)(1) should not be filed until entry of the district court's judgment. See Hilliard v. Kincheloe, 796 F.2d 308 (9th Cir. 1986).

FILED
DEC 14 1995
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, Cross-Appellee, vs. GERALD FRANK PLUNK, Defendant-Appellee, Cross-Appellant.	NOS. 94-30421 94-30422 D.C. No. CR-94- 036-01-JWS

Before: BROWNING, WRIGHT, and T.G. NELSON, Circuit Judges

The panel has voted to deny cross-appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

The cross-appellant's Emergency Motion Under Circuit Rule 27-3 is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOS. 94-30421 & 94-30422
CT/AG#: CR-94-036-01-JWS

UNITED STATES OF AMERICA

Plaintiff/Appellant-
Cross-Appellee

v.

GERALD FRANK PLUNK

Defendant/Appellee-
Cross-Appellant

FILED
DEC 29 1995
UNITED STATES
DISTRICT COURT
DISTRICT OF ALASKA
/S/
_____, Deputy

APPEAL FROM the United States District Court for the District of Alaska (Anchorage).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Alaska (Anchorage) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is REVERSED and REMANDED in part, DISMISSED in part.

Filed and entered October 17, 1995.

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST

DEC 22 1995

b y : /S/
Deputy Clerk

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

United States Constitution:

Art. III, § 2, Cl. 1. Jurisdiction. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; — to all cases of admiralty and maritime jurisdiction; — to controversies to which the United States shall be a party; — to controversies between two or more states; — between a state and citizens of another state; — between citizens of different states; — between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

Fourth Amendment. Searches and seizures. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment. Rights of accused in criminal proceedings; due process; eminent domain. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Statutes:

18 U.S.C. § 3731. Appeal by United States

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

* * *

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

The provisions of this section shall be liberally construed to effectuate its purposes.

19 U.S.C. § 1607. Seizure; value $500,000 or less, prohibited articles, transporting conveyances, monetary instruments

(a) Notice of seizure. If—

(1) the value of such seized vessel, vehicle, aircraft, merchandise, or baggage does not exceed $500,000;

(b) such seized merchandise is merchandise the importation of which is prohibited;

(3) such seized vessel, vehicle, or aircraft was used to import, export, transport, or store any controlled substance; or

(4) such seized merchandise is any monetary instrument within the meaning of section 5312(a)(3) of title 31 of the United States Code;

the appropriate customs officer shall cause a notice of the seizure of such articles and the intention to forfeit and sell or otherwise dispose of the same according to law to be

published for at least three successive weeks in such a manner as the Secretary of the Treasury may direct. Written notice of seizure together with information on the applicable procedures shall be sent to each party who appears to have an interest in the seized article.

(b) Definition of "controlled substance". As used in this section, the term "controlled substance" has the meaning given that term in section 102 of the Controlled Substances Act [21 USCS § 802].

19 U.S.C. § 1608. Seizure; claims; judicial condemnation

Any person claiming such vessel, vehicle, aircraft, merchandise, or baggage may at any time within twenty days from the date of the first publication of the notice of seizure file with the appropriate customs officer a claim stating his interest therein. Upon the filing of such claim, and the giving of a bond to the United States in the penal sum of $5,000 or 10 percent of the value of the claimed property, whichever is lower, but not less than $250, with sureties to be approved by such customs officer, conditioned that in case of condemnation of the articles so claimed the obligor shall pay all the costs and expenses of the proceedings to obtain such condemnation, such customs officer shall transmit such claim and bond, with a duplicate list and description of the articles seized, to the United States attorney for the district in which seizure was made, who shall proceed to a condemnation of the merchandise or other property in the manner prescribed by law.

19 U.S.C. § 1609. Seizure; summary forfeiture and sale

(a) In general. If no such claim is filed or bond given within the twenty days hereinbefore specified, the appropriate customs officer shall declare the vessel, vehicle, aircraft, merchandise, or baggage forfeited, and shall sell the same at

public auction in the same manner as merchandise abandoned to the United States is sold or otherwise dispose of the same according to law, and shall deposit the proceeds of sale, after deducting the expenses described in section 613 [19 USCS § 1613], into the Customs Forfeiture Fund.

(b) Effect. A declaration of forfeiture under this section shall have the same force and effect as a final decree and order of forfeiture in a judicial forfeiture proceeding in a district court of the United States. Title shall be deemed to vest in the United States free and clear of any liens or encumbrances (except for first preferred ship mortgages pursuant to subsection O of section 30 of the Ship Mortgage Act, 1920 (46 U.S.C. App. 961) or any corresponding revision, consolidation, and enactment of such subsection in title 46, United States Code) from the date of the act for which the forfeiture was incurred. Officials of the various States, insular possessions, territories, and commonwealths of the United States shall, upon application of the appropriate customs officer accompanied by a certified copy of the declaration of forfeiture, remove any recorded liens or encumbrances which apply to such property and issue or reissue the necessary certificates of title, registration certificates, or similar documents to the United States or to any transferee of the United States.

21 U.S.C. § 881. Forfeitures

(a) Subject property. The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this title.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this title.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1), (2), or (9).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), except that—

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this title or title III;

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and

(C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent or willful blindness of the owner.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this title.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this title, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this title, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(8) All controlled substances which have been possessed in violation of this title.

(9) All listed chemicals, all drug manufacturing equipment, all tableting machines, all encapsulating machines, and all gelatin capsules, which have been imported, exported, manufactured, possessed, distributed, or intended to be distributed, imported, or exported, in violation of a felony provision of this title or title III.

(10) Any drug paraphernalia (as defined in section 1822 of the Mail Order Drug Paraphernalia Control Act [21 USCS § 857]).

(11) Any firearm (as defined in section 921 of title 18, United States Code) used or intended to be used to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2) and any proceeds traceable to such property.

(b) Seizure pursuant to Supplemental Rules of Certain Admiralty and Maritime Claims. Any property subject to civil forfeiture to the United States under this title may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules of Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when—

(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this title;

(3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the Attorney General has probable cause to believe that the property is subject to civil forfeiture under this title.

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly.

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure.

(c) Custody of Attorney General. Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under any of the provisions of this title, the Attorney General may—

(1) place the property under seal;

(2) remove the property to a place designated by him; or

(3) require that the General Services Administration take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law.

(d) Other laws and proceedings applicable. The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this title, insofar as applicable and not inconsistent with the provisions hereof; except that such duties as are imposed upon the customs

officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this title by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

(e) Disposition of forfeited property. (1) Whenever property is civilly or criminally forfeited under this title the Attorney General may—

(A) retain the property for official use or, in the manner provided with respect to transfers under section 616 of the Tariff Act of 1930, transfer the property to any Federal agency or to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property;

(B) except as provided in paragraph (4), sell, by public sale or any other commercially feasible means, any forfeited property which is not required to be destroyed by law and which is not harmful to the public;

(C) require that the General Services Administration take custody of the property and dispose of it in accordance with law;

(D) forward it to the Bureau of Narcotics and Dangerous Drugs for disposition (including delivery for medical or scientific use to any Federal or State agency under regulations of the Attorney General); or

(E) transfer the forfeited personal property or the proceeds of the sale of any forfeited personal or real property to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property, if such a transfer—

(i) has been agreed to by the Secretary of State;

(ii) is authorized in an international agreement between the United States and the foreign country; and

(iii) is made to country which, if applicable, has been certified under section 481(h) of the Foreign Assistance Act of 1961.

* * *

(h) Property title, etc. vested in United States. All right, title, and interest in property described in subsection (a) shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

(i) Stay of civil proceeding. The filing of an indictment or information alleging a violation of this title or title III, or a violation of State or local law that could have been charged under this title or title III, which is also related to civil forfeiture proceeding under this section shall, upon motion of the United States and for good cause shown, stay the civil forfeiture proceeding.

(j) Venue. In addition to the venue provided for in section 1395 of title 28, United States Code, or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

[(k)](l) Functions. The functions of the Attorney General under this section shall be carried out by the Postal Service pursuant to such agreement as may be entered into between the Attorney General and the Postal Service.

21 U.S.C. § 841. Prohibited acts A

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

* * *

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. ... Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives or ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, is derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

* * *

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendants is an individual or $5,000,000 if the defendant is other than an individual, or both. ... Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

* * *

21 U.S.C. § 843. Prohibited acts C

Unlawful acts

* * *

Communication facility

(b) It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

* * *

Penalties

(d) Any person who violates this section shall be sentenced to a term of imprisonment of not more than 4 years, a fine of not more than $30,000, or both; except that if any person commits such a violation after one or more prior convictions of him for violation of this section, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 8 years, a fine of not more than $60,000, or both.

* * *

21 U.S.C. § 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. § 848. Continuing criminal enterprise

Penalties; forfeitures

(a) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 30 years and which may be up to life imprisonment, to a fine not to exceed the greater of twice the amount authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title.

Conditions for life imprisonment for engaging in continuing criminal enterprise

(b) Any person who engages in a continuing criminal enterprise shall be imprisoned for life and fined in accordance with subsection (a) of this section, if—

(1) such person is the principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders; and

(2)(A) the violation referred to in subsection (c)(1) of this section involved at least 300 times the quantity of a substance described in subsection 841(b)(1)(B) of this title, or

(B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers, or leaders, received $10 million dollars in gross receipts during any twelve-month period of its existence for the manufacture, importation, or distribution of a substance described in section 841(b)(1)(B) of this title.

Continuing criminal enterprise defined

(c) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

Suspension of sentence and probation prohibited

(d) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and the Act of July 15, 1932 (D.C.Code, secs. 24-203 to 24-207), shall not apply.

* * *

28 U.S.C. § 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Phillip Paul Weidner
Phillip Paul Weidner & Associates, Inc.
330 "L" Street, Suite 200
Anchorage, Alaska 99501
(907) 276-1200

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Case No. A94-0036 CR (JWS)
	)	
vs.	)	
	)	
GERALD FRANK PLUNK, et al.,	)	
	)	
Defendants.	)	
	)	

AFFIDAVIT OF GERALD FRANK PLUNK IN SUPPORT OF MOTION FOR ORDER BARRING FURTHER PROSECUTION ON GROUNDS OF DOUBLE JEOPARDY

STATE OF ALASKA	)	
	)	ss.
THIRD JUDICIAL DISTRICT	)	

GERALD FRANK PLUNK, being first duly sworn under oath, deposes and states:

1. I voluntarily surrendered myself in the instant criminal matter on or about March 25, 1994 and was arrested.

2. At the time of my arrest I was wearing a Rolex watch which, upon information and belief, is the

watch the subject of Seizure No. 152090, Case No. RG940002.

3. I was initially told by the marshals that I could remove my watch and give it to my attorney, Mr. Bryson.

4. The watch was then taken by a DEA agent.

5. After repeated inquiries by me and/or my attorney concerning said watch, I received notice of administrative forfeiture of the watch.

6. I further received notice of administrative seizures 152199, 152824, and 152183 with regard to certain currency, gold and guns allegedly seized from my residence, and upon the advice of my counsel, pursuant to my concerns and my attorney's concerns of the impact on my defense in the underlying criminal charges, I did not file formal claims at the administrative level given the advice of counsel and my concerns as they related to allegations made by the government in the superseding indictment and at the bail hearing and otherwise with regard to the significance of said items, namely, to the effect that admitting formal ownership and possession of said items might tend to incriminate me within the meaning of the Fifth Amendment of the United States Constitution, as to the criminal charges in this case.

FURTHER AFFIANT SAYETH NAUGHT.

/S/

_____

Gerald Frank Plunk

SUBSCRIBED AND SWORN TO before me, the undersigned, a Notary Public in and for the State of Alaska, duly commissioned as such, this 2nd day of November, 1994.

/S/

_____

Notary Public in and for the
State of Alaska
My Commission Expires: ___

Phillip Paul Weidner
Phillip Paul Weidner & Associates, Inc.
330 "L" Street, Suite 200
Anchorage, Alaska 99501
(907) 276-1200

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Case No. A94-0036
	)	CR (JWS)
vs.	)	
	)	
GERALD FRANK PLUNK, et al.,	)	
	)	
Defendants.	)	
	)	

AFFIDAVIT OF GERALD FRANK PLUNK IN SUPPORT OF MOTION FOR ORDER BARRING FURTHER PROSECUTION ON GROUNDS OF DOUBLE JEOPARDY

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

GERALD FRANK PLUNK, being first duly sworn under oath, deposes and states:

1. I am the defendant in United States v. Plunk, Case No. A94-036 (JWS).

2. I am tendering this affidavit in support of my Motion to Bar Further Prosecution on the Grounds of Double Jeopardy.

3. By tendering this affidavit, I do not intend to make any limited or general waiver of my right to remain silent or against self-incrimination under the United

States constitution or my rights to confidentiality of attorney/client communications.

4. It is my knowledge and belief that pursuant to the search warrant executed on my personal residence at 14940 Longbow Drive, Anchorage, Alaska, nine firearms were seized.

5. I obtained the following seized firearms from individuals who the government has informed me are cooperating witnesses in the case against me:

a. Ruger 22 mm: gift from David Nova.

b. Colt 45: purchased from Hal Booher.

6. I purchased the Wilding 475 pistol through my son-in-law, Michael Frizzell.

FURTHER AFFIANT SAYETH NAUGHT.

/S/

_____

Gerald Frank Plunk

SUBSCRIBED AND SWORN TO before me, the undersigned, a Notary Public in and for the State of Alaska, duly commissioned as such, this 2nd day of November, 1994.

/S/

_____

Notary Public in and for the
State of Alaska
My Commission Expires: ___

Phillip Paul Weidner
Phillip Paul Weidner & Associates, Inc.
330 "L" Street, Suite 200
Anchorage, Alaska 99501
(907) 276-1200

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Case No. A94-0036 CR (JWS)
	)	
vs.	)	
	)	
GERALD FRANK PLUNK, et al.,	)	
	)	
Defendants.	)	
	)	

AFFIDAVIT OF COUNSEL IN SUPPORT OF DEFENDANT PLUNK'S MOTION FOR ORDER BARRING FURTHER PROSECUTION ON GROUNDS OF DOUBLE JEOPARDY

STATE OF ALASKA	)	
	)	ss.
THIRD JUDICIAL DISTRICT	)	

PHILLIP PAUL WEIDNER, being first duly sworn under oath, deposes and states:

1. I am the attorney of record for the defendant Gerald Frank Plunk in the instant matter.

2. This affidavit is submitted in support of the defendant's pending Motion for Order Barring Further Prosecution on Grounds of Double Jeopardy/Notice of Objection on Double Jeopardy Grounds to Further

Proceedings and/or Jury Trial, and is not intended or made as any limited or general waiver of his rights to remain silent and against self-incrimination under the United States Constitution, or his rights to confidentiality of attorney/client privileges under same.

3. I was Mr. Plunk's attorney of record at the time of the return of the superseding indictment herein, and further, his attorney of record at the time of two detention hearings, and further, reviewed a transcript of the initial detention hearing held when Mr. Plunk was previously represented by William P. Bryson.

4. I was attorney of record for Mr. Plunk in the instant matter when he was served with and brought to my attention notice of seizures in Seizure Nos. 1521831, 152199, and 152824 relating to items allegedly seized from his alleged residence at 14940 Long Bow Drive, Anchorage, Alaska at the time of service of a search warrant herein.

5. Based upon my understanding of the government's allegations in the indictment and informal and/or formal discovery herein, including the fact that they were alleging that there was a critical "heat sealing" or "vacuum sealing" "food saving" machine which was allegedly discovered in a cocaine conspiracy case on the East Coast that had allegedly been used to package money and the fact that said machine was allegedly traced to a purchase by Mr. Plunk, and further my understanding that certain of the items the subject of the above-referenced seizures (i.e. the guns, gold, and currency, Seizure Nos. 152199, 152824, and 1521831) related to ownership and/or possession of currency allegedly seized at Mr. Plunk's residence (including Search Warrant No. A94-0049 MJ, inventory nos. N-127, N-109, and N-112), and further based upon my understanding that the government was alleging that certain sales of drugs had been made out of that residence by Mr. Plunk to a cooperating witness, and further, based upon my understanding of the federal sentencing and substantive laws with regard to firearms and controlled substances, and further, based upon my understanding of the government's allegations and evidence and the court's findings at the bail/detention hearing, I advised Mr. Plunk that in order to protect his rights against self-incrimination and to not prejudice his defense with regard

to the criminal charges in the underlying superseding indictment that he should not file a formal claim at the administrative level with regard to said seizures. This advice was further based upon my understanding of the government's position and/or case law with regard to attempts to preserve Fifth Amendment privileges while litigating administrative and civil forfeitures brought by the government as a result of alleged controlled substance activities.

FURTHER AFFIANT SAYETH NAUGHT.

/S/

_____

Phillip Paul Weidner

SUBSCRIBED AND SWORN TO before me, the undersigned, a Notary Public in and for the State of Alaska, duly commissioned as such, this 2nd day of November, 1994.

/S/

_____

Notary Public in and for the
State of Alaska
My Commission Expires: 7/25/97

U.S. Department of Justice
Drug Enforcement Administration

Seizure #: 152824 Case #: RG940002
PROP: PLACER GOLD, 3 SMALL PLASTIC BAGS
ID#:
VALUE: $967.89
SEIZURE DATE: 24 MAR 94
SEIZURE PLACE: ANCHORAGE, AK
OWNER: PLUNK, GERALD FRANK
SEIZED FROM: PLUNK, GERALD FRANK, INMATE
JUDICIAL DIST: ALASKA

DATE:
AUGUST 19, 1994

DECLARATION FOR FORFEITURE

The above-described property has been seized by agents of the DRUG ENFORCEMENT ADMINISTRATION pursuant to 21 U.S.C. 881. Notice of a seizure has been sent to all known parties who may have a legal or possessory interest in the property. Also, in accordance with 19 U.S.C. 1607, notice of the seizure has been published and no claims have been filed for the property within 20 days from the date of first publication of the advertisement. THEREFORE, it is hereby declared that such property is forfeited to the United States pursuant to 19 U.S.C. 1609.

/S/
Senior Attorney
Office of Chief Counsel
Asset Forfeiture Section

cc: DEA/DO: SEATTLE, WASHINGTON
DEA/RO: ANCHORAGE, ALASKA
USMS: ANCHORAGE, ALASKA
BY: AEB AD CODE #: 244

DEA.294 (MAR.92)

U.S. Department of Justice
Drug Enforcement Administration

Seizure #: 152199 Case #: RG940002
PROP: $9,660.00 U.S. CURRENCY
ID#:
VALUE: $9660.00
SEIZURE DATE: 24 MAR 94
SEIZURE PLACE: ANCHORAGE, AK
OWNER: PLUNK, GERALD FRANK, INMATE NO.:
SEIZED FROM: PLUNK, GERALD FRANK
JUDICIAL DIST: ALASKA

DATE:
JUNE 24, 1994

DECLARATION FOR FORFEITURE

The above-described property has been seized by agents of the DRUG ENFORCEMENT ADMINISTRATION pursuant to 21 U.S.C. 881. Notice of a seizure has been sent to all known parties who may have a legal or possessory interest in the property. Also, in accordance with 19 U.S.C. 1607, notice of the seizure has been published and no claims have been filed for the property within 20 days from the date of first publication of the advertisement. THEREFORE, it is hereby declared that such property is forfeited to the United States pursuant to 19 U.S.C. 1609.

/S/
Senior Attorney
Office of Chief Counsel
Asset Forfeiture Section

cc: DEA/DO: SEATTLE, WASHINGTON
DEA/RO: ANCHORAGE, ALASKA
USMS: ANCHORAGE, ALASKA
BY: AEB AD CODE #: 244

DEA.294 (MAR.92)

U.S. Department of Justice
Drug Enforcement Administration

Seizure #: 152183 Case #: RG940002
PROP: 9 ASSORTED WEAPONS
ID#:
VALUE: $4040.00
SEIZURE DATE: 24 MAR 94
SEIZURE PLACE: ANCHORAGE, AK
OWNER: PLUNK, GERALD F.
SEIZED FROM: PLUNK, FRANK INMATE #760
JUDICIAL DIST: ALASKA

DATE:
JUNE 10, 1994

DECLARATION FOR FORFEITURE

The above-described property has been seized by agents of the DRUG ENFORCEMENT ADMINISTRATION pursuant to 21 U.S.C. 881. Notice of a seizure has been sent to all known parties who may have a legal or possessory interest in the property. Also, in accordance with 9 U.S.C. 1607, notice of the seizure has been published and no claims have been filed for the property within 20 days from the date of first publication of the advertisement. THEREFORE, it is hereby declared that such property is forfeited to the United States pursuant to 19 U.S.C. 1609.

/S/
Senior Attorney
Office of Chief Counsel
Asset Forfeiture Section

cc: DEA/DO: SEATTLE, WASHINGTON
DEA/RO: ANCHORAGE, ALASKA
USMS: ANCHORAGE, ALASKA
BY: AEB AD CODE #: 242

DEA.294 (MAR.92)

U.S. Department of Justice
Drug Enforcement Administration

Seizure #: 152090 Case #: RG940002
PROP: ROLEX WRIST WATCH, ROLEX OYSTER
ID#:
VALUE: $1500.00
SEIZURE DATE: 25 MAR 94
SEIZURE PLACE: ANCHORAGE, AK
OWNER: PLUNK, GERALD F.
SEIZED FROM: PLUNK, FRANK (INMATE #7603)
JUDICIAL DIST: ALASKA

DATE:
JUNE 3, 1994

DECLARATION FOR FORFEITURE

The above-described property has been seized by agents of the DRUG ENFORCEMENT ADMINISTRATION pursuant to 21 U.S.C. 881. Notice of a seizure has been sent to all known parties who may have a legal or possessory interest in the property. Also, in accordance with 19 U.S.C. 1607, notice of the seizure has been published and no claims have been filed for the property within 20 days from the date of first publication of the advertisement. THEREFORE, it is hereby declared that such property is forfeited to the United States pursuant to 19 U.S.C. 1609.

/S/
Senior Attorney
Office of Chief Counsel
Asset Forfeiture Section

cc: DEA/DO: SEATTLE, WASHINGTON
DEA/RO: ANCHORAGE, ALASKA
USMS: ANCHORAGE, ALASKA
BY: AEB AD CODE #: 241

DEA.294 (MAR.92)

U.S. DEPARTMENT OF JUSTICE
Drug Enforcement Administration

Seizure #: 152199 Case #: RG940002
PROP: $9,660.00 U.S. CURRENCY

VALUE: $9660.00
SEIZURE DATE: 94 MAR 24 152199
SEIZURE PLACE: ANCHORAGE, AK

SZD FROM: PLUNK, GERALD FRANK
OWNER: *
JUDICIAL DIST: ALASKA
BOND REQUIRED: $966 152199
DATE OF THIS LETTER: 09 MAY 94
DATE OF FIRST PUBLICATION: 94 MAY 18

PLUNK, GERALD FRANK
14940 LONGBOW DR
ANCHORAGE
AK 99516
152199B

NOTICE OF SEIZURE

The above-described property was seized by Special Agents of the Drug Enforcement Administration (DEA) for forfeiture under Title 21, United States Code (U.S.C.), Section 881, because it was used or acquired as a result of a **drug-related offense**. (See Title 21, Code of Federal Regulations (C.F.R.), Section 1316.91(d) (54 Federal Register 37610-37611) for the definition of the term "drug-related offense.") The seizure date and place, as well as other pertinent information regarding the property are also shown above. Pursuant to Title 19, U.S.C., Sections 1602-1619, and Title 21, C.F.R. Sections 1316.71-1316.81, procedures to administratively forfeit this property are under way. You may petition the DEA for the return of the property or your interest in it (remission or mitigation), and/or you may contest the seizure and forfeiture of the property in **court**. Also, under

certain circumstances, you may petition for the expedited release of the property. **You should review the following procedures very carefully.**

TO REQUEST REMISSION OR MITIGATION OF THE FORFEITURE

If you want to request the remission (pardon) or mitigation of the forfeiture, submit a petition for remission or mitigation within thirty (30) days from your receipt of this notice. Follow the regulations set forth in Title 28, C.F.R., Sections 9.1-9.7. State the facts and circumstances which you believe justify return of the property or return of your interest in the property. File an original petition and two copies with the DEA's Asset Forfeiture Section. No bond is necessary if only a petition is filed. **Pursuant to Title 28, C.F.R., Section 9.4(c), a petition for remission or mitigation for forfeiture shall be signed and sworn to by the petitioner.**

TO CONTEST THE FORFEITURE

In addition to or in lieu of petitioning for remission or mitigation, you may contest the forfeiture of the seized property in UNITED STATES DISTRICT COURT. To do so, you must file a claim of ownership and cost bond with the DEA. Submit the bond in the amount shown above in the form of a cashier's check or a certified check payable to the U.S. Department of Justice, or present satisfactory surety. **Claims must be signed by the parties making the claim**. Unsupported submissions signed by attorneys are insufficient to satisfy the requirement the claims be personally executed. United States v. Fifteen Thousand Five Hundred Dollars, 558 F.2d 1359, 1360 (9th Cir. 1977).

If you are indigent (needy and poor) you may not have to post the bond. To request a waiver of the bond, you must fully disclose your finances in a signed statement called a "Declaration in Support of Request to Proceed *In Forma Pauperis*" along with a claim of ownership of the property. Use the format of the *pauperis* declaration shown as Form 4 in the Appendix of Forms following Rule 48 of the Federal Rules of Appellate Procedure or obtain a form from a DEA

field office. The claim of ownership, with either bond or the "Declaration in Support of Request to Proceed *In Forma Pauperis*" must be filed within **twenty (20) days** of the **first date** of publication of the notice of seizure in the edition of the USA Today newspaper referenced above. The notice will be published three successive weeks.

U.S. DEPARTMENT OF JUSTICE
Drug Enforcement Administration

Seizure #: 152824 Case #: RG940002
PROP: PLACER GOLD, VALUE: $967.89

VALUE: $967.89
SEIZURE DATE: 94 MAR 24 152824B
SEIZURE PLACE: ANCHORAGE, AK

SZD FROM: PLUNK, GERALD FRANK
OWNER:
JUDICIAL DIST: ALASKA
BOND REQUIRED: $250
DATE OF THIS LETTER: 09 MAY 94 152824B
DATE OF FIRST PUBLICATION: 94 MAY 18

PLUNK, GERALD FRANK
14940 LONGBOW DR
ANCHORAGE
AK 99516
152824B

NOTICE OF SEIZURE

The above-described property was seized by Special Agents of the Drug Enforcement Administration (DEA) for forfeiture under Title 21, United States Code (U.S.C.), Section 881, because it was used or acquired as a result of a **drug-related offense**. (See Title 21, Code of Federal Regulations (C.F.R.), Section 1316.91(d) (54 Federal Register 37610-37611) for the definition of the term "drug-related offense.") The seizure date and place, as well as other pertinent information regarding the property are also shown above. Pursuant to Title 19, U.S.C., Sections 1602-1619, and Title 21, C.F.R. Sections 1316.71-1316.81, procedures to administratively forfeit this property are under way. You may petition the DEA for the return of the property or your interest in it (remission or mitigation), and/or you may contest the seizure and forfeiture of the property in **court**. Also, under

certain circumstances, you may petition for the expedited release of the property. **You should review the following procedures very carefully.**

TO REQUEST REMISSION OR MITIGATION OF THE FORFEITURE

If you want to request the remission (pardon) or mitigation of the forfeiture, submit a petition for remission or mitigation within thirty (30) days from your receipt of this notice. Follow the regulations set forth in Title 28, C.F.R., Sections 9.1-9.7. State the facts and circumstances which you believe justify return of the property or return of your interest in the property. File an original petition and two copies with the DEA's Asset Forfeiture Section. No bond is necessary if only a petition is filed. **Pursuant to Title 28, C.F.R., Section 9.4(c), a petition for remission or mitigation for forfeiture shall be signed and sworn to by the petitioner.**

TO CONTEST THE FORFEITURE

In addition to or in lieu of petitioning for remission or mitigation, you may contest the forfeiture of the seized property in UNITED STATES DISTRICT COURT. To do so, you must file a claim of ownership and cost bond with the DEA. Submit the bond in the amount shown above in the form of a cashier's check or a certified check payable to the U.S. Department of Justice, or present satisfactory surety. **Claims must be signed by the parties making the claim**. Unsupported submissions signed by attorneys are insufficient to satisfy the requirement the claims be personally executed. United States v. Fifteen Thousand Five Hundred Dollars, 558 F.2d 1359, 1360 (9th Cir. 1977).

If you are indigent (needy and poor) you may not have to post the bond. To request a waiver of the bond, you must fully disclose your finances in a signed statement called a "Declaration in Support of Request to Proceed *In Forma Pauperis*" along with a claim of ownership of the property. Use the format of the *pauperis* declaration shown as Form 4 in the Appendix of Forms following Rule 48 of the Federal Rules of Appellate Procedure or obtain a form from a DEA

field office. The claim of ownership, with either bond or the "Declaration in Support of Request to Proceed *In Forma Pauperis*" must be filed within **twenty (20) days** of the **first date** of publication of the notice of seizure in the edition of the USA Today newspaper referenced above. The notice will be published three successive weeks.

U.S. DEPARTMENT OF JUSTICE
Drug Enforcement Administration

Seizure #: 152183 Case #: RG940002
PROP: 9 ASSORTED WEAPONS, VALUE: $4,040.00

VALUE: $4040.00
SEIZURE DATE: 94 MAR 24 152183B
SEIZURE PLACE: ANCHORAGE, AK

SZD FROM: PLUNK, GERALD FRANK
OWNER:
JUDICIAL DIST: ALASKA
BOND REQUIRED: $404
DATE OF THIS LETTER: 25 APR 94 152183B
DATE OF FIRST PUBLICATION: 94 MAY 04

PLUNK, GERALD FRANK
14940 LONGBOW DR
ANCHORAGE
AK 99516
152183B

NOTICE OF SEIZURE

The above-described property was seized by Special Agents of the Drug Enforcement Administration (DEA) for forfeiture under Title 21, United States Code (U.S.C.), Section 881, because it was used or acquired as a result of a **drug-related offense**. (See Title 21, Code of Federal Regulations (C.F.R.), Section 1316.91(d) (54 Federal Register 37610-37611) for the definition of the term "drug-related offense.") The seizure date and place, as well as other pertinent information regarding the property are also shown above. Pursuant to Title 19, U.S.C., Sections 1602-1619, and Title 21, C.F.R. Sections 1316.71-1316.81, procedures to administratively forfeit this property are under way. You may petition the DEA for the return of the property or your interest in it (remission or mitigation), and/or you may contest the

seizure and forfeiture of the property in **court**. Also, under certain circumstances, you may petition for the expedited release of the property. **You should review the following procedures very carefully.**

TO REQUEST REMISSION OR MITIGATION OF THE FORFEITURE

If you want to request the remission (pardon) or mitigation of the forfeiture, submit a petition for remission or mitigation within thirty (30) days from your receipt of this notice. Follow the regulations set forth in Title 28, C.F.R., Sections 9.1-9.7. State the facts and circumstances which you believe justify return of the property or return of your interest in the property. File an original petition and two copies with the DEA's Asset Forfeiture Section. No bond is necessary if only a petition is filed. **Pursuant to Title 28, C.F.R., Section 9.4(c), a petition for remission or mitigation for forfeiture shall be signed and sworn to by the petitioner.**

TO CONTEST THE FORFEITURE

In addition to or in lieu of petitioning for remission or mitigation, you may contest the forfeiture of the seized property in UNITED STATES DISTRICT COURT. To do so, you must file a claim of ownership and cost bond with the DEA. Submit the bond in the amount shown above in the form of a cashier's check or a certified check payable to the U.S. Department of Justice, or present satisfactory surety. **Claims must be signed by the parties making the claim**. Unsupported submissions signed by attorneys are insufficient to satisfy the requirement the claims be personally executed. United States v. Fifteen Thousand Five Hundred Dollars, 558 F.2d 1359, 1360 (9th Cir. 1977).

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U.S. DEPARTMENT OF JUSTICE
Drug Enforcement Administration

Seizure #: 152090 Case #: RG940002
PROP: 1 ROLEX WRIST WATCH, VALUE: $1,500.00
SERIAL'S #9378785, #168000
VALUE: $1500.00
SEIZURE DATE: 94 MAR 25 152090B
SEIZURE PLACE: ANCHORAGE, AK

SZD FROM: PLUNK, GERALD FRANK
OWNER:
JUDICIAL DIST: ALASKA
BOND REQUIRED: $250
DATE OF THIS LETTER: 18 APR 94 152090B
DATE OF FIRST PUBLICATION: 94 APR 27

PLUNK, GERALD FRANK
14940 LONGBOW DR
ANCHORAGE
AK 99516
152090B

NOTICE OF SEIZURE

The above-described property was seized by Special Agents of the Drug Enforcement Administration (DEA) for forfeiture under Title 21, United States Code (U.S.C.), Section 881, because it was used or acquired as a result of a **drug-related offense**. (See Title 21, Code of Federal Regulations (C.F.R.), Section 1316.91(d) (54 Federal Register 37610-37611) for the definition of the term "drug-related offense.") The seizure date and place, as well as other pertinent information regarding the property are also shown above. Pursuant to Title 19, U.S.C., Sections 1602-1619, and Title 21, C.F.R. Sections 1316.71-1316.81, procedures to administratively forfeit this property are under way. You may petition the DEA for the return of the property or your interest in it (remission or mitigation), and/or you may contest the

seizure and forfeiture of the property in **court**. Also, under certain circumstances, you may petition for the expedited release of the property. **You should review the following procedures very carefully.**

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If you want to request the remission (pardon) or mitigation of the forfeiture, submit a petition for remission or mitigation within thirty (30) days from your receipt of this notice. Follow the regulations set forth in Title 28, C.F.R., Sections 9.1-9.7. State the facts and circumstances which you believe justify return of the property or return of your interest in the property. File an original petition and two copies with the DEA's Asset Forfeiture Section. No bond is necessary if only a petition is filed. **Pursuant to Title 28, C.F.R., Section 9.4(c), a petition for remission or mitigation for forfeiture shall be signed and sworn to by the petitioner.**

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Rules of Appellate Procedure or obtain a form from a DEA field office. The claim of ownership, with either bond or the "Declaration in Support of Request to Proceed *In Forma Pauperis*" must be filed within **twenty (20) days** of the **first date** of publication of the notice of seizure in the edition of the USA Today newspaper referenced above. The notice will be published three successive weeks.

ROBERT C. BUNDY
UNITED STATES ATTORNEY

SUZANNE C. HAYDEN
Assistant U.S. Attorney
Federal Building & U.S. Courthouse
222 W. 7th Avenue, Room 253, #9
Anchorage, Alaska 99513-7567
(907) 271-5071

FILED
Apr 26 1994
U.S. DISTRICT COURT
DISTRICT OF ALASKA
By ____ Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)
	) Case No. A94-036 CR
Plaintiff,	) **COUNT 1**
	) **CONSPIRACY TO**
vs.	) **DISTRIBUTE**
	) **COCAINE**
GERALD FRANK PLUNK, aka "FRANK", aka "EL FEO" AND TIMOTHY PIERSON, aka "TIM" aka "MR. T."	) Vio. Title 21 U.S.C. §841(a)(1) and 846
	)
	) **COUNT 2**
	) **CONTINUING**
	) **CRIMINAL**
Defendants.	) **ENTERPRISE**
	) Vio. Title 21 U.S.C. §848
	COUNT 3-8 **USE OF COMMUNICATION FACILITY** Vio. Title 21 U.S.C. § 843(b)

COUNT 9-11
POSSESSION WITH INTENT TO DISTRIBUTE
Vio. Title 21 U.S.C. § 841(a)(1)

COUNT 12
CONSPIRACY TO DISTRIBUTE COCAINE
Vio. Title 21 U.S.C. § 846 and 841(a)(1)

SUPERSEDING INDICTMENT

THE GRAND JURY CHARGES THAT:

COUNT 1

Beginning on or about April 1, 1993, and continuing until on or about December 31, 1993, in the State and Federal of Alaska [sic] and elsewhere,

GERALD FRANK PLUNK
aka "FRANK"
aka EL FEO
AND
TIMOTHY PIERSON
aka "TIM"
aka "MR. T."

the defendants herein, and other persons whose names are known and unknown to the grand jury, did knowingly and intentionally combine, conspire, confederate and agree to commit offenses against the United States, that is to distribute in excess of 2000 kilograms of cocaine, a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 841(a)(1) and 846.

A. **OBJECTIVES OF THE ORGANIZATION**

1. One objective of the organization was the possession of controlled substances (cocaine) with the intent to distribute the cocaine within the United States.

2. Another objective of the organization was the transportation of loads of cocaine from the Los Angeles, California and the Houston, Texas areas to New Jersey on behalf of the Colombian Cali Cartel.

3. The primary objective of the organization was the distribution of multi-kilogram loads of cocaine for financial gain.

B. **THE PARTICIPANTS IN THE ORGANIZATION**

The organization consisted of numerous individuals aligned in various sub-groups all working toward the common objective of distributing cocaine for financial gain.

1. JACO, aka EL COMPADRE, a Colombian National living in Colombia was the principal organizer, supervisor and manager of the organization. His job was the transportation of cocaine into the United States and the ultimate supervision of the distribution of the cocaine throughout the United States.

2. LEON ALBERTO MALCA, aka JAMES, aka RICKI (hereinafter JAMES) (charged elsewhere) was a principal supervisor in New York who coordinated the Colombian and North American distribution of multi-kilo loads of cocaine.

3. GERALD FRANK PLUNK, aka FRANK, aka FEO, (hereinafter PLUNK) was the principal organizer, supervisor and manager of the interstate transportation of multi-kilo loads of cocaine. He was responsible for establishing a transportation network from the Southern borders of the United States to the New Jersey area.

4. JOHN TIMOTHY PIERSON, aka MR. T., (hereinafter PIERSON) was initially a driver for PLUNK but later became responsible for the transportation network when law enforcement began investigating PLUNK.

5. Tony, aka, Alphonse, supervised the storage of cocaine in Los Angles [sic], California.

6. CARLOS ANDRES SERRATO (charged elsewhere) and MIGUEL ANGEL VILLALKA (charged elsewhere) delivered vehicles loaded with cocaine to predesignated locations to be off-loaded by the drivers initiating their cross-country travel.

7. ELBA DUENAS, aka ERICA (charged elsewhere) delivered empty vehicles from New York to predesignated locations in New Jersey to enable cross-country drivers to off-load their cocaine shipments into the vehicles. She sometimes delivered cocaine proceeds to BARRY TENDLER.

8. BARRY TENDLER aka THE BEAR, (charged elsewhere) assisted PLUNK in the delivery of cocaine to drivers in Los Angeles and participated in the distribution of payments to the drivers and the receipt of drug proceeds.

9. HAL BOOHER aka PANCHO (charged elsewhere) was an interstate driver who utilized a trailer and a motorhome to transport approximately 1225 kilos of cocaine between Los Angeles, Houston, and New Jersey.

10. CISCO and D.D., unindicted co-conspirators, were interstate drivers hired by PLUNK to transport approximately 1775 kilos of cocaine from Los Angeles and Houston to New Jersey, utilizing motorhomes and trucks.

C. **METHODS AND MEANS**

1. It was a part of the conspiracy that the participants of the organization employed code names, and communicated by code through the use of Sky Talk and Sky Page and cellular phones to avoid detection by law enforcement as they communicated their cocaine transportation messages.

2. It was a part of the conspiracy to use recreational-type vehicles to transport kilo loads of cocaine across country.

3. It was a part of the conspiracy that PLUNK would provide the currency to purchase the vehicles used for transporting cocaine.

4. It was a further part of the conspiracy to disguise the true nature of cross-country trips by having the drivers pass out brochures and video tapes describing

defendant PLUNK's "BIG MOUNTAIN LODGE" located near Illiamna, Alaska.

5. It was a part of the conspiracy that after being told where to begin the journey, the drivers would load boxes or duffel bags of cocaine into waiting vehicles and travel across the United States to New Jersey.

6. It was a part of the conspiracy that upon arrival in New Jersey, drivers were notified that certain empty vehicles were waiting to be filled with the cocaine.

7. It was a further part of the conspiracy that throughout the journey and upon its completion, the drivers communicated by telephone and pager with defendant PLUNK who informed James of their progress.

8. It was a part of the conspiracy that El Compadre in Colombia would speak directly to James about the transactions, and that James would repeat portions of their conversations to PLUNK and that James would repeat similar conversations of PLUNK's to El Compadre.

9. It was a part of the conspiracy that PLUNK would purchase commercial heat sealing machines through BIG MOUNTAIN LODGE and distribute them to the Colombians for the purpose of packaging proceeds (cash) from the distribution of cocaine.

10. It was a further part of the conspiracy that PLUNK would often pay drivers with vacuum packed envelopes of cash.

11. It was further part of the conspiracy that defendant PIERSON was to assume the role of transportation supervisor of the cocaine distribution when James and PLUNK feared the police were investigating PLUNK.

12. Finally, it was a part of the conspiracy that drivers were instructed how to avoid detection on their cross-country trips and instructed that they would be provided a "family doctor" (signifying a lawyer) in the event they were arrested.

D. **OVERT ACTS**

In furtherance of the conspiracy and to achieve the objects thereof the following over [sic] acts were committed:

1. On or about the first week of April 1993, PLUNK travelled [sic] to South America to meet with

members of the Cali Cartel to discuss transporting cocaine into Alaska as well as across the United States.

2. On or about April 15, 1993, PLUNK traveled to Seattle, Washington to hire a driver to transport cocaine.

3. On or about April 26, 1993, PLUNK purchased a motorhome in Eagle River, Alaska for the purpose of transporting cocaine.

4. On or about June 4, 1993, PLUNK and Tendler arrived in Los Angeles to assist in loading approximately 174 kilos of cocaine into a motorhome which was destined for New Jersey.

5. In or around early July, PLUNK directed Cisco, and Pancho to transport cocaine from Los Angeles to New Jersey.

6. On or about August 21, 1993, PLUNK directed an unindicted co-conspirator to transport approximately 200 kilos of cocaine from Houston, Texas to New Jersey.

7. On or about mid-September, PLUNK arranged for the transfer of ownership of a load vehicle used for transporting cocaine.

8. In or around early September, PLUNK directed Cisco to transport cocaine from Houston, Texas to New Jersey.

9. On or about October, 1993, PLUNK directed Pancho to transport approximately 200 kilos of cocaine from Houston, Texas to New Jersey.

10. In or around the middle of October, PLUNK directed Cisco to transport cocaine from Los Angeles to New Jersey.

11. In late October, PLUNK directed the transportation of approximately 100 kilos of cocaine from Los Angeles to New Jersey.

12. On or around Thanksgiving 1993, PLUNK directed Cisco, to transport a load of cocaine from Los Angeles to New Jersey in a Winnebago Motorhome.

13. On December 7, 1993, James telephoned PLUNK in Alaska to discuss Pancho's upcoming cocaine delivery as well as a delivery by defendant PIERSON.

14. On December 7, 1993, James telephoned Tony in California to discuss PLUNK and Pancho's upcoming arrival in Los Angeles.

15. On December 7, 1993 James telephoned Colombia to discuss "Panchito's" arrival.

16. On December 12, 1993, Pancho was arrested delivering 220 kilograms of cocaine to New Jersey.

17. On December 12, 1993, James telephoned Tony in Los Angeles and El Compadre in Colombia with news of Pancho's arrest.

18. On December 12, 1993, James telephoned PLUNK and discussed Pancho's arrest and discussed getting a lawyer for him.

19. On December 18, 1993, James telephoned Tendler to discuss Pancho's knowledge of the organization and getting a lawyer for him.

20. On December 18, 1993, James telephoned defendant PIERSON to discuss various locations for distributing cocaine, describing the organization to be like American Express . . . "everywhere".

All in violation of Title 21 U.S.C. § 841(a)(1) and 846.

COUNT 2

THE GRAND JURY FURTHER CHARGES THAT:

A. Beginning at a time unknown to the Grand Jury, but no later than April 1993, and continuing thereafter up to and including December 1993, in the State and Federal District of Alaska, and elsewhere,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly, intentionally, and unlawfully engage in a Continuing Criminal Enterprise in that he did violate Title 21, United States Code, Sections 846, 841(a)(1) and 843(b), which violations, among others, were part of a continuing series of violations, included but not limited to, the following:

1. Beginning on or about April 1, 1993, and continuing until on or about December 31, 1993, in the State and Federal of Alaska [sic] and elsewhere,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

Defendant herein, did willfully and knowingly combine, conspire and agree with others whose names are known or unknown to the Grand Jury to distribute in excess of two thousand kilograms of cocaine and to possess with intent to distribute cocaine, as alleged in Count One of this Indictment, which is incorporated in full herein;

2. On or about June 4, 1993, defendant PLUNK did knowingly and intentionally distribute approximately 174 kilograms of cocaine, as alleged in Count 9 of this Indictment, which is incorporated in full herein;

3. On or about July, 1993, in the State and Federal District of Alaska, defendant PLUNK did knowingly and intentionally distribute approximately 350 kilograms of cocaine.

4. On or about August 21, 1993, defendant PLUNK did knowingly and intentionally distribute approximately 200 kilograms of cocaine as alleged in Count 10 of this Indictment which is incorporated in full herein;

5. On or about December 12, 1993, defendant PLUNK did knowingly and intentionally distribute approximately 220 kilograms of cocaine as alleged in Count 11 of this Indictment which is incorporated in full herein;

6. On or about December 7, 1993, defendant PLUNK did knowingly and intentionally use the telephone to further his drug trafficking activities as alleged in Count 3 of this Indictment, which is incorporated in full herein;

7. On or about December 5, 1993, defendant PLUNK did knowingly and intentionally use the telephone to further his drug trafficking activities as alleged in Count 4 of this Indictment, which is incorporated in full herein;

8. On or about December 8, 1993, defendant PLUNK did knowingly and intentionally use the telephone to further his drug trafficking activities as alleged in Count 5 of this Indictment, which is incorporated in full herein;

9. On or about December 11, 1993, defendant PLUNK did knowingly and intentionally use the telephone to further his drug trafficking activities, as alleged in Count 6 of this Indictment, which is incorporated in full herein;

Which series of violations were undertaken by defendant PLUNK in concert with at least five other persons with respect to whom defendant PLUNK occupied a position of organizer, a supervisory position, and other positions of management, and from which continuing series of violations defendant PLUNK obtained substantial income and resources.

B. **THE FORFEITURE PROVISIONS**

Through the above-mentioned continuing criminal enterprise, defendant

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

his nominees, assignees, agents and those in active concert and participation with him did directly and indirectly obtain substantial profits, proceeds and resources from said criminal enterprise, which shall be forfeited to the United States of America pursuant to the provisions of Title 21 U.S.C. § 853(a)(3) and which shall include all property constituting or derived from any proceeds obtained, directly or indirectly, as well as any properties used, or intended to be used, in any manner or part, to facilitate the commission of controlled substances violations as well as any interest in, claims against, and property or contractual rights affording said defendants a source of influence or control over the continuing criminal enterprise, including but not limited to the property described below:

1. ONE heat sealed bag of currency seized at 14940 Longbow Drive, Anchorage, Alaska on March 24, 1993 [sic], DEA Evidence number N-112.

2. Residence located at 14940 Longbow Drive, Anchorage, Alaska (Timberlux Subdivision #3, Block F, Lot 3).

3. Cabin with acreage more fully described as: T17NR5W, Section 33, Seward Prime Meridian, Alaska, Tract A, Plat 77-49, Alaska State Land Survey No. 76-182.

4. 4.99 acres of unimproved real property, T27NR4W, Section 22, Alaska Land Survey No. 77-91, Tract A (Chase Area) MATSU Borough, Alaska.

5. 12.32 acres of unimproved real property, more fully described as Inlet View Subdivision, MATSU Borough, Alaska,

a. Lot 2 Block 1
b. Lot 10 Block 1
c. Lot 11 Block 1
d. Lot 7 Block 5
e. Lot 8 Block 5
f. Lot 5 Block 6
g. Lot 6 Block 6
h. Lot 7 Block 6

6. .60 acres of unimproved real property located at Rabbit Creek Heights Block 4 Lot 6, Anchorage, Alaska.

7. Real property located at Tract B, Lot 3 #66, Sky Harbor Estates, Anchorage, Alaska.

8. Big Mountain Lodge, Igiugig, Alaska more particularly described as Lease Number 92-L-02, a portion of Lot 3, U.S. Survey 7982, Native Allotment AA-6277, located near Igiugig, Alaska, located in the Kvichak Recording District, State of Alaska, containing 14.057 acres.

If any of the properties described above as being subject to forfeiture pursuant to Title 21 United States Code, Section 853, as a result of any act or omission of the defendants —

a. cannot be located upon the exercise of due diligence;
b. has been transferred to, sold to, or deposited with a third party;
c. has been placed beyond the jurisdiction of this court;
d. has been substantially diminished in value; or
e. has been commingled with other properties that cannot be subdivided without difficulty;

it is the intent of the United States of America, pursuant to Title 21, United State [sic] Code, Section § 853(p), to seek

forfeiture of any properties of the defendants up to the value of the properties listed above as subject to forfeiture.

All pursuant to Title 21, United States Code, Section 853 and 848.

COUNT 3

THE GRAND JURY FURTHER CHARGES THAT:

On or about December 7, 1993, at approximately 7:49 PM, in the State and Federal District of Alaska,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly and intentionally use a communication device, that is, the telephone, to facilitate drug trafficking offense to wit: conspiracy to distribute cocaine a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 846 and distribution of cocaine, in violation of title 21 U.S.C. 841(a)(1).

All in violation of Title 21 U.S.C. § 843(b).

COUNT 4

THE GRAND JURY CHARGES THAT:

On or about December 5, 1993, at approximately 11:59 AM, in the State and Federal District of Alaska,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly and intentionally use a communication device, that is, the telephone, to facilitate drug trafficking offenses, to wit: conspiracy to distribute cocaine a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 846 and distribution of cocaine, in violation of Title 21 U.S.C. 841(a)(1).

All in violation of Title 21 U.S.C. § 843(b).

COUNT 5

THE GRAND JURY FURTHER CHARGES THAT:

On or about December 8, 1993, at approximately 3:43 PM, in the State and Federal District of Alaska,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly and intentionally use a communication device, that is, the telephone, to facilitate drug trafficking offenses, to wit: conspiracy to distribute cocaine a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 846 and distribution of cocaine, in violation of Title 21 U.S.C. 841(a)(1).
All in violation of Title 21 U.S.C. § 843(b).

COUNT 6

THE GRAND JURY FURTHER CHARGES THAT:

On or about December 11, 1993, at approximately 4:03 PM, in the State and Federal District of Alaska,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly and intentionally use a communication device, that is, the telephone, to facilitate drug trafficking offenses, to wit: conspiracy to distribute cocaine a Schedule II Controlled Substance, in violation of Title 21 U.S.C. §846 and the distribution of cocaine, in violation of Title 21 U.S.C. §841(a)(1);
All in violation of Title 21 U.S.C. §843(b).

COUNT 7

THE GRAND JURY FURTHER CHARGES THAT:

On or about December 15, 1993, at approximately 3:33 PM, in the State and Federal District of Alaska,

JOHN TIMOTHY PIERSON

AKA "TIM"
AKA "MR. T."

defendant herein, did knowingly and intentionally use a communication device, that is, the telephone, to facilitate drug trafficking offenses, to wit: conspiracy to distribute cocaine a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 846 and distribution of cocaine, in violation of Title 21 U.S.C. 841(a)(1).

All in violation of Title 21 U.S.C. § 843(b).

COUNT 8

THE GRAND JURY FURTHER CHARGES THAT:

On or about December 18, 1993, at approximately 1:03 PM, in the State and Federal District of Alaska,

JOHN TIMOTHY PIERSON
AKA "TIM"
AKA "MR. T."

defendant herein, did knowingly and intentionally use a communication device, that is, the telephone, to facilitate drug trafficking offenses, to wit: conspiracy to distribute cocaine a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 846 and distribution of cocaine, in violation of Title 21 U.S.C. 841(a)(1).

All in violation of Title 21 U.S.C. § 843(b).

COUNT 9

THE GRAND JURY FURTHER CHARGES THAT:

On or about June 4, 1993, in the State and Federal District of Alaska and elsewhere,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly and intentionally distribute approximately 174 kilograms of cocaine, a Schedule II Controlled Substance, in violation of Title 21, U.S.C. § 841(a)(1).

COUNT 10

THE GRAND JURY FURTHER CHARGES THAT:

On or about August 21, 1993, in the State and Federal District of Alaska and elsewhere,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly and intentionally distribute approximately 200 kilograms of cocaine, a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 841(a)(1).

COUNT 11

THE GRAND JURY FURTHER CHARGES THAT:

On or about December 12, 1993, in the State and Federal District of Alaska,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly and intentionally distribute approximately 220 kilograms of cocaine, a Schedule II Controlled Substance in violation of Title 21 U.S.C. § 841(a)(1).

COUNT 12

THE GRAND JURY FURTHER CHARGES THAT:

Between on or about the Fall of 1980, until December 31, 1993,

GERALD FRANK PLUNK

defendant herein, did willfully and knowingly combine, conspire, confederate and agree with others known and unknown to the grand jury to commit an offense against the United States, that is to distribute in excess of 10 kilograms of cocaine, a Schedule II Controlled Substance. One primary objective of the organization was the receipt of kilogram

quantities of cocaine from Florida. The primary objective of the organization was to provide quantities of cocaine to local (Alaskan) drug traffickers for financial gain. All in violation of Title 21 U.S.C. § 841(a)(1) and 846.

A true bill.

/S/
PRESIDING GRAND JUROR

/s/ Karen L. Loeffler
for ROBERT C. BUNDY
UNITED STATES ATTORNEY

/s/ Suzanne C. Hayden
SUZANNE C. HAYDEN
ASSISTANT UNITED STATES ATTORNEY
ORGANIZED CRIME DRUG ENFORCEMENT
TASK FORCE

4/26/94
DATE

ROBERT C. BUNDY
UNITED STATES ATTORNEY

SUZANNE C. HAYDEN
Assistant U.S. Attorney

Federal Building & U.S. Courthouse
222 W. 7th Avenue, Room 253, #9
Anchorage, Alaska 99513-7567
(907) 271-5071

FILED
Mar 23 1994
U.S. DISTRICT COURT
DISTRICT OF ALASKA
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)
	) Case No. A94-036 CR
Plaintiff,	)
	) **COUNT 1**
vs.	) **CONSPIRACY TO**
	) **DISTRIBUTE**
	) **COCAINE**
GERALD FRANK PLUNK,	) Vio. Title 21 U.S.C.
	) § 841(a)(1) and 846
Defendant.	)

INDICTMENT

THE GRANT JURY CHARGES THAT:

COUNT 1

Between on or about the Fall of 1987, until no later than April, 1991, the exact dates of which are unknown,

GERALD FRANK PLUNK

the defendant herein, did willfully and knowingly combine, conspire, confederate and agree with others known and unknown to the grand jury to commit an offense against the

United States, that is to distribute in excess of 10 kilograms of cocaine, a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 841(a)(1) and 846.

A true bill.

/s/
PRESIDING GRAND JUROR

/s/ Robert C. Bundy
ROBERT C. BUNDY
UNITED STATES ATTORNEY

/s/ Suzanne C. Hayden
SUZANNE C. HAYDEN
ASSISTANT UNITED STATES ATTORNEY

3/22/94
DATE

AFFIDAVIT OF SPECIAL AGENT ROBERT E. CAYFORD

I, Robert E. Cayford, being duly sworn, hereby depose and say as follows:

INTRODUCTION

1. I am a Special Agent with the United States Drug Enforcement Administration (DEA) and have been so employed for the past eleven (11) years. I am vested with the authority to investigate violations of federal law, including Title 21, United States Code. In the course of my employment I have attended schools regarding the financial methods utilized by drug traffickers. In addition, during my eleven (11) years with DEA, I have assisted and served as the case agent on numerous drug investigations and have assisted or prepared search warrants regarding drug investigations. Upon my oath, I state that I believe the following facts to be true based on my training and experience in regard to narcotic investigations:

2. That drug trafficking is a continuous pattern of illegal substance distribution and not just a single event;

3. That drug traffickers very often place assets in the name of others to avoid detection by government agencies, and that drug manufacturers often utilize fictitious company names in an attempt to give a legitimate appearance to the purchase of items necessary for the production of controlled dangerous substances;

4. That even though these assets are in other person's names, the drug dealers continue to use these assets and exercise dominion and control over them;

5. That drug traffickers often maintain on hand large amounts of U.S. Currency in order to maintain and finance their ongoing narcotics business;

6. That individuals involved in drug trafficking profit from the sale of controlled substances and attempt to legitimize (launder) those profits. I know that to accomplish this task, these individuals often use false and fictitious records, passports, birth certificates, accounts in foreign and domestic banks, securities, cashier's checks, money drafts, letters of credit, brokerage houses, real estate, shell corporations, and business fronts. These individuals often transfer real and personal property to third persons or purchase same in other people's names;

7. That drug traffickers maintain books, computers, records, receipts, notes, ledgers, airline tickets, money orders and other papers relating to the transportation, ordering, sale and distribution of controlled substances;

8. That the aforementioned books, computers, records, receipts, notes, ledgers, etc., are maintained where the drug traffickers have ready access to them;

9. That it is common for drug traffickers to secret contraband, proceeds of drug sales, and records of drug transactions in secure locations, within their residence, vehicles, commercial storage units, safe deposit boxes, and businesses for ready access and to conceal them from law enforcement authorities;

10. That persons involved in drug trafficking often conceal in their residences caches of drugs, large amounts of currency, financial instruments, precious metals, jewelry and other items of value and/or proceeds of drug transactions relating to obtaining, transferring, secreting or spending of large sums of money made from engaging in narcotics trafficking activities;

11. That drug traffickers commonly maintain addresses and telephone numbers in books or papers which reflect names, addresses and telephone numbers for their associates in the trafficking organization;

12. That drug traffickers take or cause to be taken photographs of them, their associates, their property, and their products;

13. That drug traffickers usually keep paraphernalia for packaging, cutting, weighing and distributing the drugs. That these paraphernalia include but, are not limited to, scales, plastic bags and cutting agents;

14. That drug traffickers frequently utilize alias names during every step of the drug trafficking operation, as well as using other individuals to carry out the means of drug trafficking;

15. I knew that in United States v. Hernandez-Escargega [sic], 886 F.2d 1560, 1567 (9th Cir. 1989) and United States v. Fannin, 817 F. 2d [sic] 1379, 1381-82 (9th Cir. 1987), the Court of Appeals held that in the case of drug traffickers, evidence is likely to be found where dealers live and a search warrant may be properly issued against a suspected drug dealer's residence despite the lack of direct evidence of criminal activity at the residence.

BACKGROUND

1. On July 9, 1992, Warren Jeff Funderburk was debriefed by DEA, Anchorage, pursuant to a plea agreement in which Funderburk and his wife, Kim, pled guilty to cocaine trafficking. Warren Jeff Funderburk identified Frank Plunk as his source of supply for kilogram quantities of cocaine between the Fall 1988 and the Spring 1990. Funderburk claimed that he made 10 to 15 one kilogram purchases from Plunk during that period of time. Funderburk was a guest of Frank Plunk at his (Frank Plunk's)" [sic] Big Mountain Lodge" near Lake Iliamna, Alaska during that time.

2. On March 18, 1994, a Source of Information (SOI) was interviewed by DEA, Anchorage. This SOI admitted to being the facilitator of cocaine transactions between Frank Plunk and Warren Jeff Funderburk. The SOI would pick up money from Funderburk and deliver it to Frank Plunk at his

(Plunk's) residence on Long Bow Drive, Anchorage, Alaska. Plunk would give the cocaine to the SOI at the time the money was delivered. The SOI would then deliver the cocaine to Funderburk at his residence.

3. On December 12, 1993, Hal Booher was arrested by DEA following the seizure of approximately 220 kilograms of cocaine from Booher's motorhome which Booher was driving in New Jersey. Booher was charged with Conspiracy and Possession with Intent to Distribute Cocaine in the Federal District of New Jersey.

4. Hal Booher agreed to cooperate with DEA following his arrest. Booher provided the following background information relating to his cocaine transporting activities:

A) About April 1993, Hal Booher was recruited by Gerald Frank Plunk to transport cocaine from Los Angeles, California or Houston, Texas to New Jersey. Plunk told Booher that he (Booher) would earn $20,000 to $30,000 per load. Plunk indicated that he already had other driver(s) transporting cocaine for him.

B) About August 1993, Gerald Frank Plunk sent Booher $17,000.00 U.S. Currency via Federal Express or United Parcel Service (UPS). The money was to be used by Booher to purchase a recreational vehicle for transporting cocaine. The money was a verbal loan from Plunk to Booher.

C) Between August 1993 and December 1993, Booher admitted that he transported seven or eight loads for Plunk. Each load was about the same size, 200-220 kilograms.

D) Hal Booher became acquainted with Gerald Frank Plunk in Alaska in about November 1983. Booher became aware that Plunk distributed cocaine in the Anchorage, Alaska area. Booher stated that Plunk has a desk top computer at his (Plunk) home on Long Bow Drive, Anchorage, Alaska and that Plunk often coordinated cocaine transportation from his home telephone.

5. On March 11, 1993, a Source of Information (SOI) was interviewed by DEA, Anchorage, about SOI's knowledge of Gerald Frank Plunk. SOI stated that Plunk supplied him/her with cocaine on an average of three times per week during 1989 and 1990. SOI obtained the cocaine on numerous occasions from Plunk at Plunk's home located at 14940 Long Bow Drive, Anchorage, Alaska.

6. Based on the preceding information and the eleven (11) years of experience I have in the field of drug investigations, I believe Gerald Frank Plunk to be conducting a commercial cocaine distribution enterprise from his residence located at 14940 Long Bow Drive, Anchorage, Alaska. I also believe that he has stored cocaine at his residence for approximately nine years and that there is evidence at the residence which will include cocaine, weighing, and packaging materials, currency and other assets and proceeds derived from the illicit trafficking of cocaine, business records showing purchase and sales and financial records showing proceeds and disposition of proceeds which are ill-gotten gains of the sale of cocaine. I believe there is evidence at the residence relating to transporting large shipments of cocaine across the United States.

Further your affiant sayeth naught.

/S/

Robert E. Cayford, Special Agent, Drug Enforcement Administration

Subscribed and Sworn to Before me this 22nd day of March 1994 at Anchorage, Alaska.

/S/

U.S. Magistrate Judge